IN THE

Court of Appeal

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
Division Three
Civ. No. B 005912
(Super. Ct. No. C420153)

CHURCH OF SCIENTOLOGY OF CALIFORNIA,
Plaintiff-Appellant,

and

MARY SUE HUBBARD,
Intervenor-Plaintiff-Appellant,

—against—

GERALD ARMSTRONG,
Defendant-Respondent.

ON APPEAL FROM SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES
JUDGE PAUL G. BRECKENRIDGE, JR.

APPELLANTS' REPLY BRIEF AND REPLY APPENDIX

ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN, STANDARD, KRINSKY & LIEBERMAN, P.C.
740 Broadway—Fifth Floor
New York, New York 10003-9518
(212) 254-1111
Counsel for Appellants

DONALD RANDOLPH
OVERLAND, BERKE, WESLEY, GITS, RANDOLPH & LEVANAS
2566 Overland Ave.—7th Fl.
Los Angeles, Cal. 90064
(213) 559-8150
Counsel for Appellants

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167
Counsel for Appellant Mary Sue Hubbard

JOHN G. PETERSON
PETERSON & BRYNAN
8530 Wilshire Blvd.
Suite 407
Beverly Hills, Cal. 90211
(213) 659-9965
Counsel for Appellant Church of Scientology of California

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Introduction

When the rhetorical smoke has cleared in this case, the court is faced with a critical core question: Will the law of California permit a private individual--indeed, a fiduciary--to resort to self-help by taking and misusing the private and confidential archival property of a Church on the ground that he believed that the property would help him defend against conjectured litigation and against future threats to his personal safety, where the individual had ample time to resort to judicial procedures to safeguard those perceived interests?

In addressing this question, it is crucial to understand the narrow scope of the defense tried below. Defendant's brief argues that a justification defense based on "compelling governmental interests," on "public interests," or on "superior private interests" is supported by the cited authorities, and that exposure of the Church's "abuses" and "frauds" constitutes such interests. These issues, however, were not tried below.[1/] As defendant concedes, no evidence was admitted and no proper findings of fact were made as to any objective public or private interests or any actual fraud or other wrongdoing by the Church. The only justification defense tried below, and the only defense found by the trial court, was the so-called state-of-mind defense--that is, that defendant believed that his conduct would help him secure evidence for future litigation and would reduce his risk of personal harm. (A.App. 255).[2/] Thus, all of defendant's evidence pertaining to the justification defense was admitted solely to show his state

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1/ Even if these defenses had been tried below, they are inapplicable to this case for the same reason that the state-of-mind defense, discussed below, is inapplicable. That is, none of these defenses are applicable where the defendant had time to resort to prior judicial procedure to safeguard his interests, rather than resorting to self-help.

2/ The abbreviations of page references in this brief are as follows: Reporter's Transcript (R.T.); Appellants' Brief (A.Br.); Respondent's Brief (R.Br.); Appellants' Appendix (A.App.); Respondent's Appendix (R.App.); Appellants' Reply Appendix (A.R.App.); Exhibits (Ex.).

of mind, not to show the truth or falsity of his accusations of wrongdoing by the Church. (See Statement of Facts and Point VIII, infra).3/

The defense actually tried below has a fatal weakness. The undisputed evidence showed that defendant spent a period of months gathering up the documents from Mr. Garrison's custody, showing them to various third parties, and making several deliveries to lawyers. There is no evidence or findings--nor can there be--that throughout that long period defendant reasonably believed he was faced with immediate and present attacks on his safety or immediate and present threats to the security of the documents (duplicate copies of which were in the care of his close friend and confidant, Mr. Garrison, at two separate locations). That is, the undisputed evidence shows that defendant, even if he were experiencing generalized fear about what the Church might do, had ample time and capacity to resort to judicial procedures to secure the documents or safeguard his future safety rather than resort to self-help intrusions on plaintiffs' personal and property rights.

It is simply inconceivable that the law would recognize a defense in such a case. Even authorized law enforcement authorities may not circumvent judicial procedures in circumstances such as these, which fall far short of the exigent circumstances required to allow a warrantless invasion of privacy or property rights. It would be perverse to give a civil litigant--with ready access to judicial avenues of self-protection--greater license to unilaterally invade the rights of others.

No amount of inflammatory and prejudicial rhetoric about the plaintiffs--or assertions of fact about patterns of wrongdoing not supported on the present record--can alter the invalidity of the justification defense. Nor can such rhetoric and assertions alter the fact that defendant's unclean hands defense relies on a few unexceptional occurrences that are typical of litigation contexts--a heated argument; wholly lawful contacts with witnesses; and the hiring of private investigators to locate stolen documents. These incidents neither constitute the kind of misconduct

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3/ Evidence was admitted as to the actual events that occurred after defendant appropriated and misused the documents and after this action was brought, in connection with the unclean hands defense. (R.T. 310; R.Br. 84 n.49)

required to invoke the unclean hands defense nor taint the rights of privacy and property on which plaintiffs sue. In any event, none of the occurrences are in any way attributable to plaintiff Hubbard; and thus, as a matter of law, the unclean hands defense cannot block her entitlement to injunctive relief.

STATEMENT OF CASE

Proceedings Below

Defendant's characterization of the proceedings and evidence below is fundamentally misleading and inaccurate in four respects. First, defendant indicates that the pretrial preliminary injunction provided for discovery procedures by third parties and intimates that this diminishes plaintiffs' privacy interest in the documents. (R.Br. 3, 91). Defendant fails to note that the preliminary injunction specifically provided for the parties to make any and all objections to third-party motions for discovery (R.App. 31) including, of course, privacy objections. No third-party discovery of documents was in fact granted between the date the preliminary injunction was issued and the date of the trial court's unsealing order. Plaintiffs at no time waived their privacy rights; to the contrary, they asserted them insistently at every phase of the proceedings.

Second, defendant's statement that the unclean hands defense was stricken with leave to amend is erroneous. In fact, the court rejected the unclean hands defense three times in pretrial proceedings. On the first two occasions, the court so ordered without any ruling that defendant had leave to amend. (A.App. 127, A.R.App. 1); on the third occasion, the court specifically granted only thirty days leave to amend from February 1, 1983 (A.App. 151). Defendant, however, did not move for leave to amend until April 2, 1984 (R.App. 4), well after the thirty-day deadline, well after the 10 day period for reasserting a motion under CCP § 1008, and well after the six-month period for applying for relief from a previous order under CCP § 473. Thus, when the trial court permitted defendant to re-raise the defense on the eve of trial, defendant had long since lost the right with finality and with prejudice to reasserting it.

Third, defendant attempts to defend the trial court's adoption of defendant's adversarial pre-trial statement of facts without any reference to the evidence actually adduced at trial. Defendant's pretrial statement of facts was submitted before crucial evidentiary rulings limiting the purpose for which evidence would be introduced at trial. As indicated throughout this brief, the trial court's decision is, in fact, riddled with findings not supported by the present trial record.

Finally, as discussed in detail below, defendant's brief makes extensive and inflammatory assertions of fact about purported patterns of "frauds" and "abuses" by the Church--factual issues that in fact were not tried below.[4/] It is thus important to re-emphasize that defendant's counter-claim--alleging a panoply of such torts by the Church--was severed from plaintiffs' complaint precisely because such issues were not to be tried at this stage of the proceedings. (A.App. 152, 184, 226).

STATEMENT OF FACTS

Defendant's statement of facts recites an array of purported abuses and wrongdoing by the Church, depicting an inflammatory and highly prejudicial background for defendant's conduct. On the present record, however, such assertions of fact are wholly improper and beyond the bounds of the issues tried below. As all parties agree--and as the trial court repeatedly and clearly ruled before and during trial--evidence of supposed past practices of the church was introduced for the limited purpose of showing defendant's state of mind at the time he took the documents, not for its actual truth or falsity. Before addressing the substance of the evidence admitted at trial, it is therefore necessary to outline the categories of evidence admitted and the limited purposes for which the evidence was admitted.

4/ In the trial from which this appeal is taken, evidence of supposed past practices of the church was introduced solely to show defendant's state of mind, not for its actual truth or falsity.

A. Categories of Evidence Admitted

The record below can be usefully divided into four categories of evidence. The first category is plaintiffs' evidence pertaining to defendant's duties as Church archivist, the limits on his and Mr. Garrison's authorization to use the document, and his conduct in taking and disseminating the documents. This evidence, of course, was admitted for its truth. The second category is the testimony of defendants and his witnesses regarding the alleged past practices of the Church--destruction of evidence, frauds, "fair game", "shore stories", "culling" files, "RPF," etc. The trial court admitted this testimony solely for the purpose of showing defendant's state of mind, not for its actual truth or falsity.[5] The third category of evidence--the documents themselves and defendant's testimony pertaining to the contents of the documents--was admitted for the same limited purpose.[6] The fourth category, admitted for its actual truth or falsity, is evidence pertaining to the unclean hands defense; the trial court restricted this evidence to specific acts of alleged harassment against defendant after plaintiffs brought this suit, (R.T. 310, R.Br. 84 n.49) and defendant relies

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[5] The court's ruling that the testimony of defendant and his witnesses would be admitted solely for his state of mind was made initially as a ruling on plaintiffs' Motion In Limine Limiting the Subject Matter of Admissable Evidence and the Testimony of Various Witnesses. (A.App. 231). That motion objected to all categories of evidence of past Church policies and practices, including alleged frauds, crimes, and torts by the Church or the Hubbards; "fair game doctrine"; "suppressive person declares"; shredding of documents; etc. The court clearly ruled that this evidence would be admitted only for defendant's "state of mind". (R.T. 213) The court first made this ruling as to the first category of such evidence, i.e. shredding of documents (R.T. 213). The court then addressed each other category of alleged Church practices, and ruled that such evidence as well would be admitted under the same limits as the first category. See, e.g., R.T. 222 (frauds); R.T. 223 (crimes or torts); R.T. 225 (torts against enemies); R.T. 251-526 ("fair game doctine"); R.T. 252 ("suppressive person declares"); R.T. 255, 263 (Church financial matters). At the beginning of defendant's case, defendant's counsel confirmed that his evidence as to the justification defense would be introduced solely "to show what Mr. Armstrong's state of mind was" (R.T. 1385). And, throughout trial, as defendant's brief notes, "[t]he trial court repeated, almost after every objection to this evidence, that it was only accepted for defendant's state of mind." (R.Br. 96).

[6] R.T. 1799,1805; R.Br. 98-99.

only on acts occurring after he left the Church to establish his unclean hands defense, (R.Br. 83-90) although the trial court purported to make findings based on much broader categories of evidence which had been admitted exclusively to show defendant's state of mind. See Point VIII, infra.

Therefore, all findings by the trial court about alleged past practice of the Church and Mr. Hubbard's purported "alter-ego" relationship to the Church are unsupported by any evidence of record and should be stricken.

B. The Substantive Evidence

1. The Archives Assignment and Defendant's Taking of the Documents.

Defendant's Statement of Facts sets forth evidence in an apparent attempt to show that his general archival duties were carried out pursuant to the authorization of Mr. and Mrs. Hubbard. (R.Br. 11-13). Defendant does not, however, set forth any evidence to rebut his own testimony that defendant's position as archivist was a post within the Church of Scientology (R.T. 699-701, 703, 712); that the archives were confidential, valuable and contained private and personal materials (R.T. 736-38, 903-04, 708-09, 719-20, 731, 734, 776-77, 781-82, 784, 793-94, 800, 806-07); that both defendant and Mr. Garrison knew that the only purpose for which they were authorized to control and to use the archival material was for writing a biography subject to the review of Mr. and Mrs. Hubbard (R.T. 719-727); that defendant knew that neither he nor Mr. Garrison was authorized to take and use the documents in the way that he did after leaving the Church (R.T. 720-25, 726-29, 731-32); that, in addition to taking the documents for his own "defense", defendant took them for use in other litigation and showed them to third parties other than his lawyers (R.T. 764-65, 769, 797); that defendant spent a period of several months obtaining and using the documents for these various unauthorized purposes (R.T. 758-774); and that at the time of his taking and misuse of the documents, they were in the custody and care of his close friend and confidant, Mr. Garrison, who kept duplicate copies at two separate locations to ensure their safekeeping. (R.T. 1748, 3607)7/

7/ Mr. Garrison at no time indicated that he or anyone else was about to
(footnote continued)

2. Defendant's History In the Church of Scientology and the Church's Practices and Policies (The Justification Evidence).

As discussed above, testimony by defendant and his witnesses about alleged patterns or policies of wrongdoing by the Church was not admitted for its actual truth or falsity. The summary of that testimony as if it were admitted for its truth in defendant's statement of facts (R.Br. 4-11), and the repeated references to supposed actual frauds or abuses throughout the defendant's brief is therefore unsupported on the record, wholly improper, and should be stricken. The impropriety of such assertions of "fact" is especially egregious because defendant is well aware that the evidence was not admitted for its truth (see R.Br. Point VIII; infra, Point VIII) and that the prejudicial impact of such inflammatory assertions is great.

Moreover, defendant's summary of the testimony is riddled with substantive mischaracterizations, exaggerations, or distortions. Even though this testimony was not admitted for its truth, in order to mitigate the prejudicial impact of defendant's improper summary, plaintiffs here offer corrections and amplifications to defendant's summary. More important, even if this evidence--when properly considered only for defendant's state of mind--established that defendant had generalized fears about what the Church might do, it does not establish — and the trial court did not find -- a reasonable belief that either he or the documents faced any immediate and present physical attack during the months when he obtained the documents from Mr. Garrison and misused them.

(footnote continued from previous page)
destroy the documents (e.g. R.T. 761). Defendant's assertion that he saved one small box of Church documents from shredding over two years before he misappropriated the other documents (R.Br. 11) has nothing to do with whether the security of the documents was ever imminently threatened throughout the months that defendant spent obtaining them from Mr. Garrison and misusing them. In any event, it is undisputed that, at the time that defendant purportedly "saved" that box, it was his superior within the Church, Laurel Sullivan, who had the authority to determine what should be done with the box; and she exercised that authority to preserve the box (R.T. 1499). Thereafter, all of the archives were protected under tight security against theft or damage. (R.T. 737-38). And, at the time defendant re-acquired the documents for delivery to third parties, the documents were safely in the custody of his close friend Mr. Garrison who kept duplicate copies at two separate locations. (R.T. 1748, 3607).

Defendant first asserts that there were "lies being told about Hubbard" when defendant began working on the Apollo in 1971. He cites a "shore story" that "the crew and ship were part of a Panamanian business management corporation called 'Operation and Transport Limited'" ("OTC"), and that Mr. Hubbard was no longer director of Scientology. (R.Br. 5). Defendant's brief fails to mention, however, that defendant himself testified that OTC existed and that both OTC and the ship were registered in Panama (R.T. 1418); that the "shore story" was a temporary response to an attack against crew members in Greece (R.T. 4004); and that Mr. Hubbard had in fact resigned as Executive Director of the Church. (R.T. 2791). In any event, defendant introduced no evidence to show that the "shore stories" had any connection with his purported belief, ten years later, that he or the documents were in danger.

Defendant refers repeatedly to the Rehabilitation Project Force ("RPF") as though it were a "prison", with "prisoners" and "sentences." (R.Br. 5, 8). The evidence showed that RPF was an entirely voluntary program in which Church staff who were performing unsatisfactorily were given the choice of demotion to less attractive jobs (which defendant disparages as "menial") as an alternative to discharge. (R.T. 4234-44). Indeed, defendant so stated in a sworn affadavit in 1980 (Ex. 48); and, upon completion of his own participation in the program, defendant wrote an effusive "success story" stating that he was "extremely fortunate" for the opportunity to become "redeemed." (Ex. 53). Again, there was no evidence that this demotion program had any connection with defendant's belief that he or the documents were in danger after he left the Church.

Defendant's brief claims he lived in fear aboard the Apollo, (R.Br. 6) but there was no evidence that he was physically restrained from leaving the ship at any time during his four and a half years on board; and his own wife at that time testified that aboard the ship he was "chipper" and "enjoyed his job." (R.T. 4236).

The trial court explicitly ruled that evidence of "fair game" and "suppressive person declares" would be admitted only to show defendant's state of mind; and the trial court's decision mentions only defendant's "belief" in fair game. (A. App. 261). Defendant's statement of facts none-

theless argues at length that the Church had an actual policy and practice of "destroying" its "enemies". (R.Br. 6, 18-19). In the one judicial decision cited by defendant on this issue, however, the court found that the "fair game" doctrine provided only that "suppressive persons" could not seek "any protection or sanction" from the internal Scientology justice system, and that, in an event, by 1970 the "fair game" doctrine had been removed from the Scientology code of ethics. Hubbard v. Vosper 1 All. E.R. 1023, at 100 (1972).[8/] This is precisely what plaintiffs' evidence below shows. Indeed, the key document introduced by defendant in an attempt to show the existence of fair game was a 1967 letter stating only that injurious acts against an "enemy" of the Church would not be redressed through internal Scientology "discipline". (Ex. RR). Plaintiffs' highly qualified religious expert concurred in this understanding of "fair game", with no expert rebuttal by defendant. (R.T. 4079-80).

Indeed, plaintiffs objected strongly at trial that any judicial interpretation of the religious doctrines of the Church would transgress First Amendment protections of religious freedom (A.App. 235); and that the court's inquiry could constitutionally address only the alleged actual tortious or criminal acts of the Church (of which no evidence was in fact admitted, as discussed above). In this light, it is critically important that the defense witnesses--Laurel Sullivan and Edward Walters--whose testimony is cited by defendant to demonstrate "fair game" practices (R.Br. 19 n.24), testified about no actual acts by the Church that would even remotely underpin defendant's defense--that is, acts that would pose a threat to the interests in safety or legal defense of former adherents. Laurel Sullivan claimed she was subject to "fair game," but the only "evidence" she could muster was a hearsay statement that private investigators spoke to a former employer in an attempt to locate her (R.T. 3318); Mrs. Hubbard's failure to write her a letter (although Ms. Sullivan in fact had "no idea" whether this was an act of "fair game") (R.T. 3325); a Church staff member having a conversation with her (R.T. 3326); and a hearsay statement that a church member falsely told her father that she had permitted the staff member

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[8/] That court therefore rested its unclean hands inquiry solely on whether there was evidence of actual wrongful acts against the defendant. Id. at 101

to have her address (R.T. 3328). Defendant's second witness on this issue, Edward Walters, testified in general terms that "fair game" was intended to harm the reputation and business of "enemies", but he cited no instances of actual acts against actual "enemies", let alone any acts placing any people or legal documents in danger. (R.T. 3584).

Defendant's Statement of Facts also gives a highly exaggerated and inaccurate description of Church confessionals. Defendant's brief describes the inflammatory testimony of Howard Schomer--whose alleged experiences were wholly unknown to defendant--and then attempts to link it to defendant's routine participation in "security checks." (R.Br. 10). Defendant's own testimony shows, at worst, that his own experience of "security checks" was in fact very similar to "auditing," the central ministerial practice of the Church--a practice to which Church adherents are highly devoted.[9/] Security checking is a confessional form of auditing designed to "enhanc[e] somebody spiritually" by releasing "transgressions against moral codes." (R.T. 3502). Defendant conceded that he participated in hundreds of such confessionals. (R.T. 1490). He never felt himself under "attack", however, until he was asked to participate in another routine confessional in November 1981, even though the confessional never occurred; rather, he merely had a benign conversation with a Church ethics officer. (R.T. 1655-56).

Defendant's Statement of Facts also asserts that the documents taken by defendant were relevant to his complaint for fraud against the Church because they contained evidence of "lies" about Mr. Hubbard's personal accomplishments and his role in the Church. (R.Br. 25). At trial, however, defendant testified that he had merely compared the documents he had on hand with the public statements about Mr. Hubbard, without investigating into obvious and readily accessible sources that could provide documentary support for the public statements. (R.T. 1823, 1834-35, 2638-43). For example,

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9/ Auditing is "spiritual counseling" (Exh. 48) from which parishioners obtain increasing "levels and stages of spiritual enlightenment," (R.T. 4074) similar to analogous practices in the Roman Catholic, Greek Orthodox and Anglican religions. "[T]he entire procedure of auditing depends entirely on one receiving it on one's own free will" (Exh. 48). The E-Meter is a "religious artifact" (Exh. 48) utilized by ministers during spiritual counseling as it reflects "area[s] of spiritual travail . . ." (R.T. 3500, 3501).

while defendant's accusation about "lies" centered on Mr. Hubbard's World War II career, defendant conceded that he did not check the U.S. military archives in Washington, D.C., which confirmed, contrary to defendant's accusations, that Mr. Hubbard had commanded a squadron of corvettes in combat. (Ex. 60, R.T. 2638-43).

Other documentation, obtained by plaintiffs' counsel on short notice during trial,[10/] refuted Armstrong's claims that a "Snake" Thompson, whom Mr. Hubbard had known as a boy, did not exist (Exs. 106-110, R.T. 4342), that Mr. Hubbard had falsely claimed to be a medical doctor (R.T. 1071-1072), and that Mr. Hubbard had made false claims about his travels in China as a boy. (Exs. 62-63, 65-66).

Defendant's discussion of the "culling" of pre-clear files is also misleading. There was no evidence that the Church "culled" defendant's files. Church staff members who were discovered violating the confidentiality of Church files were removed from their Church positions; and all such violations had been uncovered and halted before defendant left the Church. (R.T. 3491, 3492, 3510). In any event, defendant introduced no evidence whatsoever that could link the purported "culling" of others' files with the justification for his taking and misusing Church archives--that is, with his fears for the safety of himself and the documents.

3. The Alleged Harassment of Defendant (Unclean Hands Evidence).

Defendant attempts to set forth facts showing that the Church harassed defendant in accordance with past Church practices and policies. (R.Br. 14-24). As discussed above, evidence of past Church practices and policies was not admitted for its truth. In setting forth the evidence as to the supposed Church harassment of defendant, it is therefore grossly improper for defendant repeatedly and insistently to assert that the Church's actual

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10/ Because defendant was allowed to assert his factually wide-ranging affirmative defenses on the eve of trial, plaintiffs were able to rebut only selected areas of defendant's scattershot and far-flung accusations about Mr. Hubbard's life. If retrial is required, plaintiffs now stand prepared to support other statements claimed by defendant to be false, including Mr. Hubbard's blood brotherhood with the Blackfoot Indian tribe, his Hollywood screenwriting career, his Canadian and Alaskan expeditions, and his grandfather's ranch ownership.

actions--in themselves, quite innocuous--were somehow the tip of an iceberg of terror and "fair game". Stripped of the inflammatory and improper references to these purported practices and policies, the record in this case shows that the actual actions of the Church were unexceptional and legitimate organizational responses to a fiduciary's unauthorized seizure and misuse of confidential archives.

a. Defendant's Meeting With An Ethics Officer.

The first incident cited by defendant is a directive by the Church that defendant explain what material he had removed from the archives and what his claims were against Mr. Hubbard. (R.Br. 14). As defendant's brief itself recites, this directive was followed by a wholly benign meeting between defendant and a Scientology staff member, at which defendant explained his conduct (R.Br. 15, R.T. 1655); defendant subsequently submitted a report summarizing his explanation.11/ Defendant submitted no evidence--and his brief cites none--that any abusive "security check" actually occurred; and, of course, it is defendant's burden to prove such an assertion as part of his affirmative defense. In addition, as discussed above, the description of "security checks" in defendant's brief is grossly exaggerated and distorted. Defendant had voluntarily participated in hundreds of such routine Church confessionals before without ever feeling he was under "attack". (R.T. 1490) The mere request that he participate in one more--a request that was not in fact followed by an actual confessional or any effort to make him participate involuntary--is no justification for conversion of private Church archives.

11/ Because of defendant's prejudicial and improper assertions about the Church's practices, we feel constrained to emphasize to this court that the Church's actual conduct here was no different than that of any other large scale organization faced with reports that a confidential employee has improperly used documents and has made accusations of wrongdoing about the organization's founder.

b. The Excommunication Documents.

Defendant asserts that the Church's two excommunication documents -- charging defendant with various infractions[12/] -- automatically subjected defendant to a litany of "standard fair game practice[s]." (R.Br. 19 n. 24, 86). Again, there can be no finding on the present record that the Church actually had any "standard practices", because such evidence did not come in for its truth. Thus, the only significance of these excommunications is whether they were in fact followed by actual harassment of defendant. The only such actual acts cited by defendant are the minor and unexceptional incidents discussed below.

c. The Photograph Incident.

Again, stripped of inflammatory and improper assertions about the Church's "standard practices", the photograph incident is utterly innocuous. As described in plaintiffs' opening brief, the incident was nothing more than an argument over who rightfully owned some photographs that had been taken from the Church by third parties and returned to the Church by a dealer in Church memorabilia. (R.T. 2926, 4253-55). It is undisputed that the Church never even took possession of the other set of photographs that belonged to defendant, which were returned to defendant by the dealer. (R.T. 1711). There is no evidence that those third parties ever filed claims or otherwise sought to recover that set of photographs. Thus, defendant's claim that his photographs were "confiscated" in accord with Church policies to "steal" from "enemies" (R.Br. 86) is doubly baseless--the Church never "stole" anything belonging to defendant; and, as discussed above, no evidence of actual Church policies to steal from enemies was admitted.

d. The Private Investigators.

Once again, if not for defendant's improper and inflammatory assertions, the Church's hiring of private investigators to locate missing

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12/ Even though the issues raised by the charges made in those documents were not, of course, part of the trial below, it is worth noting that several of the charges are confirmed by the evidence admitted below--such as defendant's misuse of archival materials and his dissemination of negative information about the Church.

archival property would seem like a wholly appropriate organizational response to defendant's wrongdoing. As noted in our opening brief, there is no evidence in the record--or finding of fact by the trial court--that the plaintiffs authorized or knew of any alleged harassment of defendant by private investigators. To the contrary, the unrebutted evidence was that Church counsel, who hired the private investigators, instructed the head of the private investigating firm only lawfully to observe Mr. Armstrong in order to see if he had the documents and to have no physical contact with him. (R.T. 3989). Defendant also concedes that the head of the investigating firm himself had no knowledge of the alleged harassment. (R.Br. 85; R.T. 3997). Plaintiff Mary Sue Hubbard, who had resigned from her Church post in May, 1981, had no connection whatsoever with the investigators. (R.T. 823, 858).[13/]

Also, as noted in our opening brief, defendant's evidence about alleged harassment by the investigators was contradictory; and defendant's own testimony indicated that he aggressively initiated and provoked the minor confrontations. (R.T. 1726, 1727-28, 2446, 2448, Ex.GGG). It is also undisputed that these confrontations occurred in August, 1982, after defendant obtained and misused most of the documents (R.Br. 26);[14/] and that the investigators' surveillance ended in mid-September, 1982, after the surrender of the documents to the Clerk of the superior court on September 15, 1982. (Ex. 21). Indeed, it was necessary to retain the services of the investigators precisely because defendant falsely denied that he took them. (Ex. 19).

In short, in an effort to establish an unclean hands defense, defendant has scraped together minor incidents of a kind that are not unusual in strongly contested disputes. By wrapping such minor incidents in a cloak

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[13/] For purposes of the unclean hands defense, the dirty deeds of an agent are only attributable to the principal if performed with his actual authorization and knowledge, as discussed below. The conduct of the investigators is therefore not attributable to either plaintiff.

[14/] Thus, these confrontations are irrelevent to defendant's justification defense which rested on his state of mind at the time he took the documents.

of improper and inflammatory assertions, defendant seeks to deny plaintiffs the redress to which the trial court found they were prima facie entitled.

ARGUMENT

I

THE AUTHORITIES CITED BY DEFENDANT BOLSTER RATHER THAN UNDERMINE PLAINTIFFS' CASE OF INVASION OF PRIVACY

Defendant's scattershot attempt to rebut plaintiffs' arguments as to their privacy claim in fact bolsters plaintiffs' intrusion case. The authorities cited by defendant both explicitly and implicitly rest on the very propositions of law stated in plaintiffs' brief. Indeed, even if defendant's arguments held water, they would be unavailing: defendant argues that the law recognizes an objective compelling-public-interest defense to intrusion, but simultaneously concedes--indeed, strenuously argues--that the trial court admitted evidence going only to defendant's subjective state of mind as to his personal interest in private litigation and other "self-protection".

Defendant's attempt to sew together swatches of judicial language in his support also founders for a more simple and obvious reason: it would be an absurdity if the law permitted a party--particularly a fiduciary occupying a highly confidential position--to appropriate and disseminate intimate private documents because the party unilaterally believed that he needed them for future litigation and other future "self-protection", particularly where the undisputed evidence reveals that the party (1) had ample time to resort to judicial process to assert his claim to the material or to protect his interests and in any event, (2) used the documents for purposes other than his own defense.

A. Defendant Raises No Grounds For Overturning The Trial Court's Finding of a Prima Facie Intrusion

As discussed fully in plaintiffs' opening brief, the trial judge properly found that plaintiffs had established a prima facie case of intrusion. Thus, the trial judge's factual findings included explicit findings that the documents were "private" and "confidential" (A.App. 254, 255); that defendant, after ending his employment with the Church, took control of the documents from Mr. Garrison in order to deliver them to other

parties who were hostile to the Church (A.App. 254);[15] that, at the time, both defendant and Mr. Garrison knew that although the Church had authorized "certain specific purposes" for using the documents, defendant was now taking them "for other purposes to plaintiff's detriment," (A.App. 254); and that these facts sufficed for a prima facie finding of invasion of privacy. (A.App. 255)[16]

While the trial judge's opinion stands on its own in this regard, plaintiff's opening brief nonetheless cited substantial authority to show that the prima facie elements of common law and constitutional intrusion had indeed been established, and--even more important--that, in creating a new defense to that claim, the trial court had simply misconstrued one of those prima facie elements. Thus, plaintiff's opening brief set forth the two basic elements of intrusion: (1) that the documents were indeed "private", and (2) that defendant's interference with the documents would violate the expectations of, and be offensive or objectionable to, the reasonable man.

Defendant's effort to rebut the trial court's finding of a prima facie case of intrusion is studded with errors--and with distortions of plaintiff's arguments supporting that finding. First, defendant seeks to "distinguish" several United States Supreme Court cases cited by plaintiffs on the grounds that they are Fourth and Fifth Amendment cases and are thus "not applicable to the case at bar." (R.Br. 30). Those cases are, of course, fully applicable to the proposition for which plaintiffs cited them:

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[15] As noted in plaintiffs' opening brief, the trial court's finding that defendant's friend, Mr. Garrison, gave him permission to take the documents and deliver them to his attorney is doubly irrelevant to establishing an intrusion. First, the trial court explicitly found that defendant knew that plaintiffs had not authorized either Mr. Garrison or defendant to so use the documents, and of course, that Mr. Garrison was temporarily holding the documents only pursuant to plaintiffs' limited authorization. (A.App. 254). Second, the trial court, in any event, found that Mr. Garrison's permission extended only to defendant's delivery of the documents to his attorney for purposes of defendant's conjectured litigation. The undisputed evidence at trial was that defendant in fact disclosed the documents to other third parties for purposes other than future litigation. (R.T. 768-69, 797). In an admission of fact admitted into evidence at trial, defendant admitted that he provided the documents to Mr. Flynn for use "in litigation other than the instant suits." (R.T. 764-65, 770-71).

[16] The trial court's findings are supported by defendant's own undisputed testimony, summarized supra in the Statement of Facts.

namely, that the trial court was correct in its threshold finding that personal documents of the kind at issue in this case--personal letters, diaries, self-analyses, religious writings, literary manuscripts, financial and medical records--are indeed "private" and "confidential." In Dietemann v. Time, Inc., 449 F.2d 245 (9th Cir. 1971), the leading case applying California law, the Court formulated the prima facie case of intrusion as whether a reasonable man would expect that the defendants should be excluded from the zone of privacy. This "reasonable expectation" standard is precisely the same standard used to determine the existence of federal constitutional privacy interests as well. See, e.g., Nixon v. Administrator of General Services, 433 U.S. 425, 458 (1977); Katz v. United States, 389 U.S. 347, 351-53 (1967). The federal constitutional cases cited by plaintiffs are therefore pertinent both for (1) the cumulative support they lend to the state common law and state constitutional cases cited by plaintiffs for the proposition that personal documents are a "private" sphere, as required by the first prima facie element of the intrusion claim, and (2) the direct foundation they lay for plaintiffs' argument that the trial court's unsealing order implicated privacy interests under both the state and federal constitutions (A.Br. Point IV; infra Point VII).17/

Second, defendant attempts to argue that his intrusion was not sufficiently "substantial" to constitute an actionable intrusion. In so arguing, defendant studiously avoids applying the standard explicitly formulated and applied by the California courts, and applies instead a different, higher standard required by the courts of South Carolina.

The standard consistently applied under California law is whether defendant intruded "into spheres from which an ordinary man in plaintiff's position could reasonably expect that the particular defendant should be

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17/ Likewise, defendant simply errs in arguing that these constitutional cases support a "balancing test" that allows a private party to invade another's privacy if he believes it will help him in a conjectured legal and personal defense. As discussed below, all of those cases rest on the constitutional adequacy of prior legislative or judicial authorization for invasions of privacy -- such as searches and seizures. Plaintiffs have consistently argued that the grossest defect in the trial court's new defense to intrusion is that it allows a private party to undertake the equivalent of a "search and seizure" without prior legal authorization and in the absence of truly exigent circumstances.

excluded," Dietemann, 449 F.2d at 249; that is, the "test is what is objectionable or offensive to the reasonable man." Emerson v. J.F. Shea Co., 76 Cal.App.3d 579, 592, 143 Cal.Rptr. 170 (1978); Noble v. Sears, Roebuck and Co., 33 Cal.App.3d 654, 658-60, 109 Cal. Rptr. 269 (1973)(same).

Rather than apply this straightforward standard under California law, defendant urges that this court apply instead the standard developed by South Carolina courts--that is, a standard akin to a claim for "outrageous conduct" or "infliction of emotional distress," requiring "extreme and outrageous conduct, beyond all bounds of decency" (R.Br. 38) and "blatant and shocking disregard of [plaintiffs'] rights by the defendant." Shorter v. Retail Credit Co., 251 F.Supp. 329 (D.S.C. 1966) (applying South Carolina law).18/ Defendant attempts to conflate this idiosyncratic South Carolina standard with the standard stated in other authorities which speak of a "substantial" intrusion. This sleight of hand fails for several reasons. First, the case cited by defendant that uses the term "substantial" is, again, not a California case, Mark v. Seattle Times, 635 P.2d 1081 (Wash. 1981)(Washington law). Second, although the court in Mark v. Seattle Times, id. at 1094, refers to a "substantial" intrusion, it defines such an intrusion as one that "would be offensive and objectionable to the ordinary person," which is not the stringent South Carolina standard that defendant urges this court to apply, but rather the lesser standard of California law.19/ Hence, the requirement of a "substantial" intrusion means only that a person of

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18/ Defendant also cites Nagz v. Bell Telephone Co., 436 A.2d 701 (Pa.Super. 1981) for the proposition that there is no intrusion where there is no outrageous conduct. In fact, that case found that there was no claim for infliction of mental distress where there was no "extreme and outrageous act." Id. at 705. As to the intrusion claim, the court applied the intermediate Restatement standard of a "highly offensive or objectionable act;" and also stated a standard that would find an intrusion where an act, inter alia, merely caused "mental suffering...to a person of ordinary sensitivities." Id. at 704-05. Of course, to the extent that Nagz states a stricter standard than under California law, it, like the South Carolina cases, is inapplicable here.

19/ It is true that Mark v. Seattle Times also states the intermediate Restatement standard requiring a "highly offensive" interference with private affairs. Id. at 1094. But as discussed infra, that slightly higher standard is not the standard applied under California law; and in any event, even under the intermediate standard, defendant's conduct in this case constituted an intrusion as a matter of law.

extraordinary sensitivity will not have a claim if an ordinary, reasonable person would not be offended by the intrusion.

Third, and perhaps most important, even the authorities that have applied an intermediate standard that is slightly higher than the California standard--requiring that a reasonable man would be "highly" or "strongly offended", e.g. Restatement (Second) of Torts § 652B, comment d, rather than simply "offended"[20/] -- make clear that the kind of intrusion found by the trial court in this case meets even that higher standard. Thus, the Restatement enumerates among its examples of actionable intrusion unauthorized interference with "private or personal mail," with a "safe or ... wallet," with a "private bank account," and with "personal documents." Section 652 B, Comment b. Can it be seriously contended that defendant's unauthorized appropriation and misuse of a lifetime of personal records--including the most intimate of personal diaries, journals, self-analyses, personal correspondence, and financial and medical records--would not also be strongly objectionable to a reasonable person? The obvious answer is made even clearer by examining the kinds of intrusions that have been found too "minimal" to be actionable. Comment d to Section 652B of the Restatement provides:

> There is likewise no liability unless the interference with the plaintiff's seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object. Thus there is no liability for knocking at the plaintiff's door, or calling him to the telephone on one occasion or even two or three, to demand payment of a debt. It is only when the telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff,

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20/ Defendant's brief notes -- indeed, affirmatively argues -- that the California case law (which explicitly applies the simple offensive-to-the-reasonable-man standard) does not rest on Restatement § 652B (which explicitly applies the slightly higher "highly offensive" standard). (R.Br. 34). In our opening brief, plaintiffs' purpose in discussing the California cases in conjunction with the Restatement standard for intrusion was simply to show that both rest on the offensiveness from the point of view of the reasonable victim and that therefore the trial court's effort to find a "balancing test" in the Restatement's prima facie element of unreasonableness was a mistake. It remains true that the trial court incorrectly applied the Restatement standard to the extent that it differs from the California case law.

> that becomes a substantial burden to his existence, that his privacy is invaded.

Clearly, the wholesale appropriation and misuse of an entire personal archives cannot be reduced to the de minimus offensiveness of an unwanted telephone call or a knock on the door. Similarly, in Mark v. Seattle Times, 635 P.2d 1081, 1095 (Wash. 1981), in which defendant filmed plaintiff through a store window, the intrusion was adjudged minimal where "the place from which the film was shot was open to the public and thus any passerby could have viewed the scene revealed by the camera," and where, in any event, the plaintiff's features were not recognizable in the film. See also, McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975)("[P]laintiff conceded that his activities which were filmed could have been observed by his neighbors or passersby on the road running in front of his property.") The body of personal documents appropriated and misused by defendant were clearly not subject to any comparable public access that would diminish the severity of the intrusion--the trial court explicitly found that they were "private" (A.App. 255) and "confidential." (A.App. 254).

It is important to bear in mind that the reasonable man standard is, as defendant concedes, "an objective standard ...: was the intrusion conduct to which a reasonable man would strongly object?" (R.Br. 35) The fact that the trial court downplayed the degree of subjective distress that Mrs. Hubbard experienced as a result of defendant's intrusion may be pertinent to the calculation of actual damages, but it has no bearing on whether the objective prima facie elements of an intrusion claim had been established, i.e. whether a reasonable man would be offended--highly or otherwise--by what defendant did.[21/] It may also be worth noting here that defendant also concedes that the dislike for plaintiffs shown in the trial court's Decision was wholly gratuitous dictum that improperly rests on evidence admitted only for defendant's state of mind and not for the truth or falsity of defendant's accusations against plaintiffs. (R.Br. 97); see also infra, Point VIII). At

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21/ Mrs. Hubbard testified that she was completely outraged by defendant's intrusion into her and her husband's archives. (R.T. 843). The fact that she was unable to remember the contents of a few of the 10,000 documents taken and misused by defendant (R.Br. 29 n.31) is irrelevant to whether defendant's conduct was an objectionable invasion of a private sphere.

the very least, this court should not permit the trial court's personal feelings about the sensibilities of plaintiffs taint its ruling as to what conduct would offend the sensibilities of the ordinary reasonable man!

Thus, defendant's bald statement that the trial court "was convinced that the question of whether the intrusion was highly offensive to a reasonable person should be answered in the negative" (R.Br. 39) is borne out neither by the trial court's findings nor by the case law. To the contrary, the trial court explicitly held that the prima facie elements of intrusion were established, and the case law fully supports that ruling. The trial court explicitly held for defendant only on the ground that he was justified by his subjective belief that the documents were useful to his personal interests.

B. The Authorities Cited by Defendant Bolster Plaintiffs' Argument That There Is No State-of-Mind Defense to Intrusion

Defendant writes that "[n]o court has expressly held that the defense of public interest is unavailable in an intrusion case." (R.B. 46). This claim is doubly perplexing. First, defendant's own cases so expressly hold. Second, the trial court did not apply a public interest defense, and--as defendant concedes--admitted no evidence of public interest but only evidence of defendant's state of mind as to his personal interest. (R.B. Point VIII; infra Point VIII).

Thus, in Dowd v. Calabrese, 589 F.Supp. 1206 (D.D.C. 1984), a case cited by defendant, the plaintiff moved for summary judgment on the defendant's counterclaim for common law intrusion and constitutional invasion of privacy. The court stated:

> [The plaintiff] cites a number of privileges as immunizing him absolutely or conditionally from this action, including the privilege to protect his own reputation from defamation [by gathering information for possible litigation], to protect the interest of [a third party, situated similarly to the plaintiff], and to protect the interest of the public. None of these privileges constitutes a defense either to a privacy action or to an action for deprivation of constitutional rights ....

Id. at 1222.22/

The Dowd case's rejection of defenses to intrusion based on either public or private interest is concordant with the numerous authorities cited in plaintiffs' opening brief: for example, Dietemann v. Time, Inc., 449 F.2d 245, 249-50 (9th Cir. 1971)(emphasis added), which explicitly held that the various public and private interest "[p]rivilege concepts"--which are applicable to other kinds of invasion of privacy--"are not relevant in determining liability for intrusive conduct;" McDaniel v. Atlanta Coca-Cola Bottling Co., 2 S.E.2d 810, 817-18 (Ga.App. 1939), the first American common law case on intrusion, which explicitly rejected a defense of "justification" on the grounds that defendant was "acting solely to protect [its] interests" by gathering evidence to defend against an anticipated "fake damage suit;" Froelich v. Adair, 516 P.2d 993, 997 (Kan. 1973), which, following Dietemann, supra, rejected the applicability of "privilege concepts" to intrusion claims, and stated:

> The precise motives for invasion of privacy are unimportant. Defendant's action, rather than precise motives accompanying the act or conduct, is the criterion of liability.

As for the case of Pearson v. Dodd, 410 F.2d 701, 705 (D.C. Cir. 1969), it is understandable that defendant here should ask this court to focus on what Pearson "did not say," rather than what it said. (R.Br. 47). In Pearson, the court assumed that the plaintiff's "employees and former employees did commit such an improper intrusion when they removed confidential files with the intent to show them to unauthorized outsiders"--exactly what defendant

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22/ Although Dowd later states the question of establishing a prima facie case of intrusion as whether the intruder's action was "unreasonable" and "unauthorized" or was "legitimate" and "lawful", id. at 1224-25, this general language certainly does not generate the privilege that defendant here seeks to establish--particularly in the face of the explicit language ruling out such defenses quoted above. In any event, in Dowd, defendant's claim of intrusion rested solely on the charge that plaintiff, a federal prosecutor, had conducted an information gathering investigation against plaintiff. There was no allegation that plaintiff had wrongfully appropriated or disseminated private material, as in this case. It was thus natural for the Dowd court to pose the intrusion issue as whether plaintiff's investigation was "unreasonable" or simply a "lawful" one.

did here. Id. at 704-5.[23] The court later stated explicitly that a defendant is liable for intrusion "whatever the content of what he learns," even if it is "of legitimate interest to the public." Id. at 705 (emphasis added).[24] The court explicitly contrasted the situation of a publication of private information by parties who did not engage in the initial intrusion; as to this conduct, the public interest in the information is relevant. Id.[25]

Defendant resorts to a curious foray into formal logic in his attempt to avoid the force of these decisions. (R.Br. 35, 45). He argues that these cases--which explicitly rule for plaintiffs on the ground that a defendant has no privilege or justification defense to an intrusion claim based on personal or public interest, even though these defenses do apply to other types of claims--somehow leave open the possibility for the assertion of those self-same defenses to an intrusion claim by reason of the fact that those decisions note that the privileges are applicable to other claims!

Likewise, defendant attempts to rebut illustrations 2 and 4 to Restatement Section 652B, comment b--which state that there are actionable intrusions when defendants commit intrusions for the purpose of evidence-gathering--on the ground, inter alia, that the authors of the Restatement simply neglected to "consider" a possible justification defense. (R.Br. 44).

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[23] It is important to note that in Pearson, the former employees obtained the confidential documents with the consent and collaboration of the plaintiff's current employees. Pearson therefore disposes of defendant Armstrong's argument that he did not commit an intrusion because Mr. Garrison -- the Church's current custodian of the documents -- consented to defendant's removal of the documents "with the intent to show them to unauthorized outsiders." Id. at 704-5.

[24] The court in Pearson noted that the defendants had raised the defense stated in Restatement (Second) of Agency § 395, comment f (1958), but the court gave no indication at all as to the validity of that defense. As defendant here concedes, that provision of the Restatement of Agency provides no defense to a privacy claim. (R.Br. 48 n.39). Indeed, as shown below in Point II, no court has ever applied it even to a breach of agency claim.

[25] Where there is an intrusion followed by publication, the fact of the later publication does not activate any "public interest" defense as against the intrusion claim, although damages for the intrusion may be "enhanced by the fact of later publication." Dietemann v. Time, Inc., 449 F.2d 245, 250 (9th Cir. 1971).

Defendant himself neglects to mention, however, that the Restatement explicitly establishes a panoply of public and private interest defenses to invasion of privacy claims but carefully and explicitly makes them applicable only to privacy claims other than intrusion. Restatement (Second) of Torts §§ 652F, 652G; see A.Br. 42 n.33. The suggestion that Dean Prosser and the other authors of the Restatement--who carefully identified the specific defenses and privileges to every cause of action specified throughout the Restatement, including the other claims for invasion of privacy--simply neglected to "consider" the defenses to an intrusion claim, and, indeed, were so negligent that their model illustrations of actionable intrusions were based on factual situations that, in defendant's theory, are paradigmatic examples of "justifiable" non-actionable intrusion, is more than a little silly.26/

The cases cited by defendant in support of a purported balancing-of-interests defense all rest on specific and explicit exceptions to the rule that the reasonableness of an intrusion is measured only by the sensibilities of a reasonable person in the victim's position--exceptions, indeed, that prove the general rule and that are inapplicable to this case.

First, several cases cited by defendant in support of a balancing-of-interest defense are in fact cases of invasion of privacy by publication rather than by intrusion; as discussed above, the defenses applicable to the former are inapplicable to the latter. Thus, in Emerson v. J.F. Shea Co.,

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26/ Defendant also dismisses the Restatement illustrations on the grounds that they involve evidence-gathering to initiate litigation, rather than for defensive purposes, and suggests in any event that there were reasons other than those defensive purposes that justified defendant's conduct. Indeed, there was another reason: as defendant himself argues, he took the documents because he thought "they would have evidentiary value" in his complaint against plaintiffs. (R.Br. 25). Thus, defendant admits that he committed the intrusion to initiate as well as to defend litigation. In any event, illustration 2 of Restatement Section 652B does not specify whether the actionable intrusion was intended to obtain evidence for defensive or offensive purposes. Nor do the cases draw any such distinction.

Defendant's argument that there were reasons, other than defensive purposes, that justified his intrusion, is unclear. Clearly, in applying its balancing test, the trial court's primary concern was that defendant took the documents to use for his future litigation and as some kind of shield against unspecified future physical danger. Neither of these defenses is applicable, for the reasons set forth herein and in plaintiffs' opening brief.

Inc., 143 Cal.Rptr. 170, 178 (1978), the Court first rejects an intrusion claim, applying only the test of "what is objectionable or offensive to the reasonable man." The Court then rules that the doctrine of "public disclosure of private facts" is also inapplicable because, as in the instant case, there was no "general disclosure." Id. The Court then proceeds to note that "even under the doctrine" of "public disclosure of private facts," plaintiff's claim would be defeated by a compelling public interest defense. The Emerson case is thus fully consistent with the analysis set forth in plaintiff's opening brief--that is, it applies a compelling interest defense only to invasions of privacy resting on publications and not to intrusions.27/ Likewise, two other cases cited by defendant--Meetze v. Associated Press, 230 S.C.330, 95 S.E.2d 606 (1956); Bernstein v. National Broadcasting Co., 129 F.Supp. 817 (D.D.C. 1955)--involve claims of invasion of privacy by publication, and are therefore inapplicable here.

Second, defendant cites Fowler v. Southern Bell, 343 F.2d 150 (5th Cir. 1965) and McSurely v. McClellan, 753 F.2d 88 (D.C. Cir. 1985) for the proposition that "privilege" defenses are applicable to intrusion claims. The privileges at issue in those two cases were the official immunities afforded executive and legislative officers, respectively. Those privileges are "status" privileges applicable to all causes of action brought against all executive and legislative officers. Such privileges in no way give rise to a balancing-of-interest defense shielding private actors against the particular claim of common law intrusion. To the contrary, as argued in plaintiffs' opening brief, cases such as Fowler and McSurely implicitly support plaintiffs' position, because in such garden variety cases of intrusion, no court has ever suggested that there is a defense on the grounds that the intruders were serving the "public interest" by gathering and turning over evidence of crimes or fraud. The only defense available is thus the status privilege afforded executive and legislative officers.

Third, defendant cites a narrow line of cases that explicitly rest on a debtor's or damage claimant's implicit waiver of the right of privacy or consent to grosser intrusions, thus permitting vigorous investigation and

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27/ As discussed below, even if Emerson were construed to state a compelling interest defense to intrusion, that defense is inapplicable to this case.

recovery by the creditor or insurer. It is for this reason that these cases speak of the defendant's "legitimate interest" either in recovering the debt or in conducting the claim investigation. Thus, in Norris v. Moskin Stores, Inc., 132 So.2d 321, 324 (Ala. 1961), cited by defendants, the court stated:

> "When [the debtor] accepts the credit, [the debtor] impliedly consents for the creditor to take all reasonable and necessary action to collect the bill." (emphasis added).

See also Dawson v. Associates Financial Services Co., 529 P.2d 104 (Kan. 1974) (debter impliedly consents to creditor's action to collect bill). Likewise, in McLain v. Boise Cascade Corp., 533 P.2d 343 (Or. 1975), also cited by defendants, the court's decision rested on the waiver of the right to privacy by damage compensation claimants. The court stated that such a claimant "must expect that his claim will be investigated and he waives his right of privacy to the extent of reasonable investigation." Id. at 346 (emphasis added). See also Forster v. Manchester, 189 A.2d 147, 150 (Pa. 1963) (damage claimant's right of privacy is "circumscribed"). Defendants also cite Souder v. Pendleton Detectives, 88 So.2d 716 (La.App. 1956), another insurance investigation case resting on the implied "right of our insurance companies to investigate any and all possible claims which might be filed against them." (Indeed, Souder cites only one case, Hamilton v. Lumberman's Mutual Casualty Co., 82 So.2d 61, 66 (La.App. 1955), wherein the court noted that the insurance company had the explicit contractual right to "make such investigation ... as it deems expedient.") It is this line of cases that underpins the creditor and insurer investigation cases of Shorter v. Retail Credit Co., 251 F.Supp. 329 (D.S.C. 1966) (insurance investigation)[28], and Tureen v. Equifaz, Inc., 571 F.2d 411 (8th Cir. 1978) ("legitimate" insurance investigation), also cited by defendant.

Even if these insurance and creditor investigation cases did not rest on the exceptional doctrine of implied waiver or consent, their facts have little to do with this case. None are cases of presumptively wrongful

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28/ Defendant notes that "importantly," the Shorter case cites Meetze v. Associated Press, 95 S.E.2d 606 (1956), for the proposition that the defendant's "conflicting interests" must be weighed against the victim's interests. Again, however, the exception cited by defendant proves the rule on which plaintiffs rely: Meetze is a case of invasion of privacy by publication, a claim to which the privileges inapplicable to an intrusion claim are applicable.

appropriation and misuse of private material. They are, rather, cases of investigations conducted within legal bounds although with such persistence that the court will inquire into whether the investigation amounts to harassment. Thus, in Tureen v. Equifax, Inc., 571 F.2d 411, 416 (8th Cir. 1978), the defendant merely compiled its own records on plaintiff. The court there ruled that defendant's search of its own files "was not objectionable" and therefore did not intrude on plaintiff. In what defendant here calls a "second step" of analysis, the court ruled that the compilation and retention of the defendant's own records, which is otherwise lawful, would be rendered unlawful if it has a "potential for abuse" and is unrelated to a legitimate business purpose. This analysis seems to add to, rather than detract from, the scope of protection afforded to victims of intrusions: even otherwise unobjectionable conduct by a defendant will be rendered wrongful if it carries a "potential for abuse" and serves no legitimate purpose. Id. at 416. The instant case, however, is one of actual objectionable intrusion by the "objectionable technique", id., of unauthorized appropriation and use of private documents. This court therefore need not even reach the second step of the Tureen analysis to determine whether plaintiffs' right would also be violated by otherwise lawful information collection but with a potential for abuse and without legitimate purpose. In any event, to the extent that the Tureen court rests its analysis solely on cases applying principles of the public interest in publication--see, e.g., Barber v. Time, Inc., 159 S.W.2d 291, 295 (Mo. 1942) (publication case); McNally v. Pulitzer Publishing Co., 532 F.2d 69 (8th Cir. 1976) (same)--it departs from the settled principles of California law on intrusion discussed above and in plaintiffs' opening brief.

Similarly, Shorter, supra, was a case of fully consensual and proper information-gathering. Defendant there "politely" asked plaintiff some questions, which she voluntarily answered. Id. at 331. Significantly, the court noted that such a brief and voluntary inquiry did not amount to a "constructive" illegal search and seizure, unlike the facts of our case (see infra). Id.

Defendant also argues that federal and California constitutional cases support a balancing-of-interests defense to invasion of privacy.

Again, however, closer examination shows that these cases too rest on the very propositions urged by plaintiffs.

First, as discussed above, in Emerson v. J.F. Shea Co., 76 Ca.App.3d 579, 143 Cal.Rptr. 170 (1978), the court distinguishes clearly between intrusive invasions of privacy, as to which there is no compelling interest defense, and invasions of privacy by publication, as to which the constitutional compelling-interest test is applicable.

Second, even if the cases cited by defendant were applicable both to intrusion and to publication, they rest on the familiar constitutional principle that a constitutional right can be lawfully infringed only when there is a "compelling governmental interest" and there is no "alternative means" for achieving that interest that are "less destructive" of the right invaded. White v. Davis, 13 Cal.3d 757, 772, 120 Cal.Rptr. 94 (1975). See, also Britt v. Superior Court, 20 Cal.3d 844, 855, 856 n.3 (1978); Porten v. University of San Francisco, 64 Cal.App.3d 825, 137 Cal.Rptr. 839 (1976) (transmission of confidential college grades to state agency). These cases support plaintiffs rather than defendant. Defendant not only concedes, but affirmatively argues, that the trial court admitted evidence going only to defendant's belief that his personal stake in future litigation and safety would be protected by appropriating and misusing the documents (R.Br. Point VIII). As a matter of law, then, the trial court's judgment cannot be sustained on the grounds of an actual compelling governmental interest, or even an actual compelling non-governmental "public" interest.

Moreover, even if there were evidence of an objective compelling government or public interest in this case, there was, as plaintiffs have consistently argued, an obvious "alternative means" for defendant to protect that interest. That is, if defendant had the time and wherewithal to meet with disaffected adherents and lawyers; to gather up the documents from Mr. Garrison; to travel across the country to meet with the Church's leading adversary; to make several deliveries of documents to various lawyers and other individuals--all of this over a period of months--then he surely was able to use the "alternative means" of seeking prior judicial protection of whatever interests he believed needed protecting. Such an alternative means

would not only have been "less destructive," but would have involved no infringement, of plaintiffs' constitutionally protected right.

Second, defendant cites constitutional cases that rest on prior judicial authorization of invasions of privacy; the question for the court in such cases is whether such invasion is permitted under the general compelling-interest/no-alternative-means standard just discussed or under the mandate of some other specific constitutional provision. Fisher v. United States, 425 U.S. 391 (1976) (summons requiring prior judicial enforcement); Andresen v. Maryland 427 U.S. 463 (1976) (prior judicially issued warrant); Nixon v. Administrator of General Services, 433 U.S. 425 (1977) (prior judicial review of legislation authorizing governmental custody over former President Nixon's papers). Again, defendant here did not resort to prior judicial authorization for protection of his perceived interests.29/ Is it imaginable that the law of California --whose constitution gives greater protection to privacy than under extant common law -- would permit a private party to act as a kind of combined legislature and judiciary, licensed to invade the privacy of other citizens based only on his unilateral determination that the invasion serves some personally defined private or public interest?

Prior to the 1972 Amendment to the California Constitution, California citizens already enjoyed the right to be free from governmental invasions of privacy without prior judicial authorizations in the form of a search warrant,30/ as well as the common law right, discussed above, to be

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29/ This decisive factor also disposes of two common law cases cited by defendant. In Rycroft v. Gaddy, 314 S.E.2d 39, 43 (S.C.App. 1984), the court ruled that there was no intrusion where the alleged intruder had obtained the plaintiff's bank records pursuant to a valid subpoena. The Court referred to the defendant's motive only to show that defendant had validly resorted to court process, without abusing such process. Likewise, in Schmukler v. Ohio Bell Tel. Co., 116 N.E.2d 819 (Ohio Ct. of Common Pleas 1953), the court found no intrusion where prior state legislation imposed an affirmative duty on the alleged intruder to prevent the plaintiff's discriminatory abuse of two-tiered phone rates.

30/ "The cardinal principle of the Fourth Amendment is that a warrant is required unless some grave emergency can be shown that necessitates an immediate search without a warrant." People v. Minjares, 24 Cal.3d 410, 153 Cal.Rptr. 24 (1979) (emphasis added). To justify a warrantless search, their (footnote continued)

free from intrusions by private citizens regardless of their motive. That Amendment was intended to apply equally to governmental and private parties who invaded citizens' privacy. It was also intended to strengthen the pre-existing rights to privacy. If defendant's argument were accepted, however, the 1972 Amendment would have just the opposite effect. That is, it would have weakened the pre-existing right by permitting invasions of privacy that had formerly been banned -- namely, invasions by both the government and private parties without prior judicial authorization and in the absence of truly exigent circumstances.

II

DEFENDANT ARGUES ONLY THAT AN AGENT NEED NOT REMAIN SILENT ABOUT A PRINCIPAL'S WRONGDOING; BUT MAKES NO ARGUMENT APPLICABLE TO THIS CASE, IN WHICH DEFENDANT, AFTER THE AGENCY ENDED, WRONGFULLY APPROPRIATED AND MISUSED HIS PRINCIPAL'S DOCUMENTS

Defendant, in a fine example of straw-man-bashing, states that "[i]n the present case, what plaintiffs contend is that Defendant was forever bound in silence, prevented from revealing" what he learned during his former agency relationship. (R.Br. 52). What plaintiffs urged in their opening brief, however, was something quite different: "even if defendant were privileged to report to others what he had learned as the Church's agent, he was not, in his fiduciary capacity, entitled to appropriate--and is not entitled to retain or disseminate--the Church's confidential documents," particularly when he acquired them in breach of his duty of loyalty and in the absence of a true emergency. Thus, in the two cases cited by defendant, an agent and a contracting party, respectively, were permitted simply to report rightfully-obtained, confidential information to injured parties. Willig v. Gold, 75 Cal.App.2d 809 (1946); Lachman v. Sperry--Sun Well Surveying Co., 457 F.2d 850, 852 (10th Cir. 1972). In addition to the distinction between mere disclosure of wrongdoing, on the one hand, and

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(footnote continued from previous page)
must be an immediate danger of destruction of evidence or an immediate danger to life or limb. E.g., People v. McGrew, 1 Cal.3d 404, 409, 82 Cal.Rptr. 473, 476 (1969); People v. Roberts, 47 Cal.2d 374, 303 P.2d 721 (1956). As discussed in plaintiffs' opening brief (Point I.C.) and infra, Point III, there was no evidence or finding in this case of such immediate danger.

misappropriation and misuse of confidential documents, on the other,[31] those cases are also facially inapplicable for the simple reason that defendant here, at the time he breached his fiduciary duty, was already aware of the purported wrongdoings of the Church. This case therefore presents no need for disclosure of any alleged wrongdoing to the injured party because that party was already aware of it.[32]

Defendant does not even attempt to muster case law or other authorities to bridge the gap between these cases and the instant case. As discussed below, his effort to rebut plaintiffs' additional arguments against the applicability of these cases is unavailing.

1. Comment b to Section 418 of the Restatement (Second) of Agency, states quite unambiguously that any privilege of the agent to protect his own interests at the expense of the principal's is not applicable where the agent, having acquired things "in violation of his duty of loyalty," fails to use them for the principal's benefit. As set forth in plaintiffs' opening brief (A.Br. 49), there is no question that defendant acquired the private documents in violation of his duty of loyalty under Restatement Section 396, which requires that a former agent not "take advantage of a still subsisting confidential relation created during the prior agency relations."

In response, defendant argues that defendant had permission to give the documents to Mr. Garrison, and that Mr. Garrison later gave permission to defendant to deliver the documents to his attorney. The trial court, however, explicitly found that when he retrieved the documents from Mr. Garrison, (1) defendant was no longer an agent of plaintiffs (A.App. 254) ("former employer"), (2) neither Mr. Garrison nor he were authorized to use

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[31] Thus, the trial court's and the defendant's characterization of defendant's conduct as simply "making his knowledge that of his attorney" (A.App. 261, R.Br. 39) is inaccurate in a legally significant respect. Defendant did not simply disclose his knowledge to his attorney; rather, he obtained confidential documents for an unauthorized purpose and turned them over to his attorneys and to other third parties.

[32] It is important to bear in mind that the defense relied on by the trial court (A.App. 255)--and by defendant at trial and on this appeal (R.Br. 25)--was defendant's desire to use the documents for his own defense, not his desire to disclose them to any injured third parties. Thus, as defendant concedes, Mr. Garrison's "permission" to defendant to take the documents extended only to his use of them in his own litigation. (R.Br. 24).

the documents for the "other purposes" for which Mr. Garrison "permitted" him to take the documents (A.App.254); and in any event (3) defendant used the documents for purposes other than the one permitted by Mr. Garrison.[33] There can thus be no question that "after the termination of the agency," defendant acquired the documents for an unauthorized purpose by taking advantage of his relation with Mr. Garrison, "a still subsisting confidential relation created during the prior agency relation." Restatement (Second) of Agency Section 396. Defendant thereby breached his duty of loyalty and thus, under Section 418, comment b, may not take advantage of the Section 418 privilege.[34]

2. Again, contrary to defendant's claim that plaintiffs are attempting to bind him to silence, plaintiffs' opening brief drew a distinction between disclosure of information retained in defendant's memory and defendant's conduct in this case--namely, misappropriation and misuse of confidential written documents. Defendant argues that this distinction--found in the Restatement--is only pertinent in cases of unfair competition, because the Restatement is only concerned with such economic competition. It is hard to see how the argument helps defendant, since he relies on defenses stated in the same sections of the Restatement. The terms of Restatement Section 396, in any event, are not so limited. That Section states:

> Unless otherwise agreed, after the termination of the agency, the agent:
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> * * *
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> (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets,

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[33] The undisputed evidence was that defendant showed confidential documents to third parties other than his lawyer and for purposes other than his legal defense. (R.T. 764-65, 768-69, 797).

[34] Defendant's other responses to plaintiffs' invocation of comment b to Section 418 hardly require rebuttal. He argues that comment e to Section 396 incorporates Section 418 by reference; our argument, of course, rests precisely on comment b to Section 418. He also points again to Willig, supra, and Lachman, supra, which are distinguishable precisely for the reason set forth by plaintiffs; in those cases, the confidential information was rightfully acquired by the agent and contracting party, respectively.

> written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customers retained in his memory, if not acquired in violation of his duty as agent;

The duty of confidentiality thus extends to any use of "confidential matters" to the "injury" of the principal, although the agent may use "general information" about the principal's methods "retained in his memory." Comment b to Section 396 similarly distinguishes between "copies of written memoranda"--which the former agent cannot use--and the content of those memoranda "retained in his memory"--which the former agent can use. Defendant offers no reason why this distinction should be limited to protection of a principal's economic interests and not applied to a principal's interests in privacy and confidentiality--interests, indeed, which in California are afforded constitutional protection. To the contrary, comment d to Section 396 explicitly states that the duty of a former agent applies equally to unfair competition by the former agent as well as to any other use of confidential information "to the principal's disadvantage." And, California courts have applied the law governing a fiduciary's duty to protect the confidences of the principal as strictly to cases implicating the principal's privacy interests as to cases implicating the principal's economic interest. Indeed, in the strikingly similar case of Carpenter Foundation v. Oakes, 26 Cal.App.3d 784, 792-93 (1972) (emphasis added), the Court of Appeal affirmed the trial court's injunction against defendant's misuse of written confidential documents in breach of his "agency, trust and confidentiality," while affirming that defendant remained "at perfect liberty to express himself, publicly or privately" on any subject. Thus, the most closely analogous California case supports plaintiffs' argument that there is a legally recognized and significant distinction between an agent's mere revelation of information--at issue in Willig, supra, and Lachman, supra -- and his misappropriation and misuse of confidential written documents and archival property.

3. As noted in plaintiffs' opening brief, it is extremely important to bear in mind that the general language of Restatement Sections 418 and 395, comment f, is a wholesale creation of the drafters of the Restatement.

No actual decision in California or elsewhere--either before or after the Restatement was drafted--has upheld an agent's privilege to breach his duty based on those Sections or on any analogous "interest-balancing" standard. It is equally important to note that if such a privilege were loosely applied--to permit an agent to breach his fiduciary duty based, as in this case, on his subjective belief that it would provide him with some kind of future "self-protection" and on his belief that this self-interest was superior to his principal's interests--the core policies underlying fiduciary obligation--namely, that an agent owes undivided loyalty to serving the principal's interests, see, e.g. Langford v. Thomas, 200 Cal. 192 (1926) -- would be swallowed by the exception. At the very least, the agent should not be permitted to turn against his principal and defy his fiduciary obligations if, as in this case, there is some alternative means open to the agent to protect his perceived self-interests.35/

In this light, it is of some moment that the only court that has ever so much as considered applying the Section 418 defense, rejected the defense on the precise grounds that in the absence of an "emergency" requiring "immediate action," there was no justification for breach of fiduciary duty. Patrick v. Cochise Hotels, 259 P.2d 569, 573 (Ariz. 1953). It is thus a bit odd for defendant to argue that there is no legal support for the strict necessity standard urged by plaintiffs, and that Patrick should be "limited to the facts of that case" (R.Br. 57)--for it is the only case ever to even acknowledge the Section 418 defense, and the rule it applies is the only standard that comports with the fundamental policies underlying fiduciary obligations.

Indeed, the very same standard has been adopted in the closely analogous area of employer-employee relations under federal law. Federal law permits an employee to breach his duty of loyalty in order to protect his safety only if he reasonably believes that he faces imminent physical danger and that there is no time to resort to lawful procedure to seek protection from the danger. Whirlpool Corp. v. Marshall, 445 U.S. 1, 4 n.3, 10-11 (1980).

35/ See the discussion in Point I supra, regarding the alternative means open to defendant in this case to protect the interests he was purportedly serving by breaching his fiduciary duty.

In addressing the identical strict necessity standard stated in Tarasoff v. Regents of University of California, 17 Cal.3d 425, 441, 131 Cal.Rptr. 14 (1976),[36] defendant states that "the court simply concluded that disclosure of a confidence must be reasonably tailored to meet the competing interest of the patients to privacy and the public interest in safety." (R.Br. 58). Defendant, however, gives no reason -- and there is none -- why the same strict necessity standard is not equally tailored to meet plaintiffs' privacy interests and defendant's personal interest in safety in this case.

In any event even on its face, the Section 418 defense is, as a matter of law, inapplicable to this case. That Section permits an agent to protect his actual "superior interests." It is not a defense based on the agent's subjective belief as to his interests. Defendant concedes, however, that he adduced evidence only as to his own belief, not as to any actual competing interests. (R.Br. Point VIII; see infra Point VIII).

4. Defendant's attempt to distinguish the bank confidentiality cases cited by plaintiffs also fails. He argues that these cases rest on the duty of confidentiality generated by the bank-depositor relationship, but offers no reason why the courts should be any less solicitous of the duty of confidentiality generated by the highly sensitive fiduciary status of a Church archivist, as in this case. Defendant also attempts to distinguish State v. McCray, 551 P.2d 1376 (Wash.App. 1976) on the ground that it is a Fourth Amendment search and seizure case. This distinction, however, makes McCray a fortiori applicable to this case. If a party vested with confidential information may only sacrifice that confidence at the behest of authorized law enforcement authorities seeking "the instrument by which the

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36/ Tarasoff explicitly states both prongs of the necessity standard: first, that the disclosure of confidential information be necessary to avert immediate danger of violent assault, id.; Bellah v. Greenson, 81 Cal.App.3d 614, 622, 146 Cal.Rptr. 535 (1978); and second, that the psychotherapist "preserve the privacy of his patient to the fullest extent compatible with the prevention of threatened danger" -- that is, that there be no alternative means to serve the safety interest that is less destructive of the privacy right. Tarasoff, supra, 17 Cal.3d at 441.

crime itself was committed" as opposed to seeking mere evidence of crime,[37] then, a fortiori, a private individual should not be permitted to "seize" confidential documents based on his unilateral belief that they are mere evidence of ill-defined wrongdoing.

5. Defendant concedes that the First Amendment bars an inquiry into the truth or falsity of religious belief (R.Br. 60), and does not challenge the ample authority cited by defendant demonstrating that inquiries into the "credentials and accomplishments" of a religious founder and into the internal organization and ecclesiastical rule of a religion are similarly proscribed. Defendant argues only that religious beliefs must be sincerely held, and that in any event, in this case the court made no proscribed inquiry.

Defendant, however, makes no challenge to the trial court's finding that the Church is a "religion" that has a First Amendment right to be free from the proscribed inquiries noted above. (A.App. 256-57; R.T. 297). The trial court made no finding that Church adherents were not sincere in their beliefs. Defendant merely cites to legal authority permitting an inquiry into sincerity, but points to no evidence that would overturn the trial court's ruling that the Church does enjoy the First Amendment rights afforded religions, a ruling that must implicitly rest on a finding that Church beliefs are sincere.

The trial court's decision itself shows that the court in fact undertook the proscribed inquiries noted above and in plaintiffs' opening brief. Thus the trial court agreed with a French police report that Church precepts were "pseudo-scientific theories," (A.App. 258), that the internal organization of the religion is based on a system of hierarchical control (A.App. 259); and that Church stories about its founder were false (A.App. 258-59). It is true, as defendant concedes, that these findings are gratuitous dicta that rest on evidence improperly considered for its truth. (R.Br. 97). But that is all the more reason why they should be stricken.

37/ While it is true that the disclosures in McCray were made orally, the court found it legally determinative that the search and seizure was aimed at uncovering the instrument of the crime as opposed to mere evidence. McCray, 551 P.2d at 1379.

III

THERE WAS NO FINDING OF FACT--NOR ANY EVIDENCE TO SHOW--THAT DEFENDANT REASONABLY BELIEVED HE WAS UNDER IMMINENT ASSAULT WHEN HE CONVERTED THE DOCUMENTS

Defendant attempts to make much of the fact that the doctrine of self-defense rests on the reasonable belief of the party defending himself. Plaintiffs have no quarrel with that argument; indeed, our opening brief referred many times to the issue of defendant's "reasonable belief," "apprehension," or "fear" (A.Br. 58, 60, 61, 94), and affirmatively set forth that the trial court's justification defense was a subjective one. (A.Br. 24, 25). Where defendant's argument falls short, however, is in its failure to address what it is that defendant must have reasonably believed. Defendant does not cite a single authority rebutting the universally-held rule that the party must reasonably believe himself to be under immediate assault. We need not re-cite the ample authorities cited in our opening brief that hold that the anticipated danger may not be in the future, or tomorrow, or even later in the day. Rather, there must be a reasonable belief in an immediate and present danger requiring, as a necessity, an immediate response, in order to justify resort to otherwise illegal self-help rather than resort to available legal remedies. The only case cited by defendant is Boyer v. Waples, 206 Cal.App.2d 725, 24 Cal.Rptr. 192 (1962), in which, in defendant Armstrong's characterization, "the plaintiffs did not advance upon the defendant or threaten him personally." (R.Br. 68 n.44). Defendant Armstrong fails to point out, however, that the defendant in Boyer reasonably believed that plaintiffs were presently and immediately engaged in the act of blowing up defendant's family with dynamite.38/

38/ The defense invoked by the trial court--Restatement (Second) of Torts Section 261--explicitly applies only to a party facing imminent physical danger. It therefore is inapplicable to a party facing even imminent litigation. Even if it were, however, there is no evidence that defendant reasonably believed that he faced an imminent lawsuit or that the documents were subject to imminent destruction. The documents were being held on the Church's behalf by defendant's close friend and confidant, Mr. Garrison, who never indicated in any way that he was about to destroy them. In any event, once again, if defendant had the time and capacity to spend months gathering up and delivering the documents, he was certainly able to resort to prior judicial remedies to protect the documents from any purported threat of destruction.

In this case, under the facts found by the trial court and on the undisputed record, as a matter of law defendant had no reasonable belief that he faced immediate assault at the time he converted the documents. His conversion took place over a period of several months, during which he travelled across country to meet with one lawyer; met with lawyers and other third parties and showed them the documents; gathered up the documents from Mr. Garrison; and made several deliveries to lawyers. There is no suggestion, either in the record or in the trial court's findings, that he reasonably believed himself to face present assailants during this entire process or even at any specific time during this process. Indeed, notwithstanding defendant's inflammatory incantation of the metaphorical words "attack" and "destroy," defendant introduced no evidence of actual assaults by the Church at any time against anyone. Painting a picture of an "abusive" organization may establish defendant's generalized fear (R.Br. 66-67), but it does not establish a reasonable belief in an immediate assault.

Similarly, to this day defendant has yet to even articulate a theory of -- let alone prove on the record -- how theft of plaintiffs documents was "necessary to prevent the apprehended harm and not merely that [it was] likely to be effective in preventing it." Restatement (Second) of Torts § 470, Comment b (emphasis added). His reluctance to articulate such a theory is understandable. The only imaginable rationale for how his actions could protect his safety is that he intended to hold the documents under some sort of blackmail threat against the Church. Even if the law would countenance such a "blackmail" defense, such an indirect and uncertain mode of "self-defense" was at best "likely to be effective," rather than "necessary" to prevent the purported harm. Id.

IV

DEFENDANT'S CHALLENGE TO THE TRIAL COURT'S FINDING OF A PRIMA FACIE CONVERSION FAILS BECAUSE DEFENDANT TOOK POSSESSION OF, AND MISUSED, PHYSICAL DOCUMENTS CONSTITUTING LITERARY PROPERTY

The trial court found that plaintiffs had established a prima facie case of conversion. (A.App. 254). Defendant, raising the same arguments he raised unsuccessfully in the court below, attempts to challenge that finding

on the inconsistent grounds that "documents and information" are not subject to conversion (R.Br. 72) and that the documents here are no exception to that rule because they do not constitute literary or commercial property; that plaintiffs' claim is preempted by copyright law, because the documents do constitute literary property (R.Br. 73); and that in any event plaintiffs "have possession of the copies and access to the originals presently under seal." (R.Br. 75).

Defendant has misread the authorities he cites, and has failed to cite leading authorities that stand squarely against him. First, defendant lumps together "documents and information" as a category of property not subject to conversion. All of the authorities cited by defendant make clear, however, that even if the intangible information embodied in documents is not convertible, the physical document itself is convertible. See, e.g., Pearson v. Dodd, 410 F.2d 701, 707 & n.34 (D.C. Cir. 1969) (conversion for "taking of tangible property" but not for taking intangible "ideas or information" embodied therein); People v. Kunkin, 24 Cal.App.3d 447, 459, 100 Cal.Rptr. 845, 855 (1972) ("Patently, Dodd does not hold that documents are not property. Rather it holds that information in noncommercial documents is a form of property for whose appropriation an action in conversion will not lie.") (emphasis added); U.S. v. Truong Dinh Hung, 629 F.2d 908, 922 (4th Cir., 1980) (same); Pickford Corp. v. De-Luxe Laboratories, 161 F.Supp. 367, 368 (S.D.Calif., 1958) (1958) (conversion action would lie for taking of physical reels of film, though not for "incorporeal rights embodied therein"); Italiana v. Metro-Goldwyn Mayer, 75 Cal.App.2d 464, 119 p.2d 370, 372 (1941) (same)

It is precisely for this reason that there was no conversion in Pearson. There, the defendant's only interference with the physical documents was to use them very briefly for photocopying. Only the information in the documents was taken; the documents themselves were not taken. Pearson, supra, 410 F.2d at 707. In the instant case, to the contrary, defendant took possession of original tangible documents that are the property of plaintiffs.39/ The fact that plaintiffs "have possession of

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39/ While some of the documents taken and misused by defendant in this case are photocopies, they are copies that were made with Church resources and
(footnote continued)

the copies and access to the originals presently under seal" (R.Br. 75) is irrelevant. Those documents are under seal only because plaintiffs brought suit to regain possession of their tangible property in the face of defendant's conversion--that is, in the face of defendant's "act of dominion wrongfully exerted over [plaintiffs'] personal property in denial of or inconsistent with [their] rights therein." Itano v. Colonial Yacht Anchorage, 267 Cal.App.2d 84, 87, 72 Cal.Rptr. 823 (1968). While the value of those documents to plaintiffs rests in part on the information contained in them, the undisputed evidence at trial showed that their intrinsic property value as prized--indeed sacred--archives of the Church, its founder and its founder's wife, was universally recognized by Church members and staff, including by defendant. (R.T. 1500, 1622-23). Plaintiffs' retention of copies thus cannot cure the "serious" violation of plaintiffs' "right to control the use" of the property. Restatement (Second) of Torts § 228.

Even assuming arguendo that defendant had not taken physical property but had taken only intangible "information," this case falls squarely within one of the well-recognized exceptions to the rule that intangibles may not be converted.40/ Indeed, in the case most heavily relied upon by defendant, Pearson v. Dodd, 410 F.2d 701, 708 (D.C. Cir. 1969), the court stated that these generally recognized exceptions include "literary property," "scientific invention," and "secret plans formulated...for the conduct of commerce." Defendant makes the bold claim that the archives at issue in this case--literary manuscripts, personal diaries and journals, personal letters, religious writings of a religion's founder, the founder's financial and

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(footnote continued from previous page)
facilities (R.T. 717, 763), either for direct archival purposes or for Mr. Garrison as part of his Church project. Such copies, like the originals, are therefore tangible property belonging to plaintiffs, unlike the copies made in Pearson, which were not originally made for the office files or for the office employees but only for the defendants' unauthorized possession and use.

40/ It is also important to note that the modern trend is to relax "[t]his overly restrictive rule...in favor of the reasonable proposition that any intangible generally protected as personal property may be the subject matter of a suit for conversion." Pearson v. Dodd, 410 F.2d 701, 707 n.34 (D.C. Cir. 1969); e.g., National Surety Corp. v. Applied Systems, 418 P.2d 847 (Ala. 1982) (conversion of intangible computer program).

medical records--are "identical" (R.Br. 75) to the "records of the business of [plaintiff's legislative] office" in Pearson v. Dodd, supra, 410 F.2d at 707. It is not surprising that defendant chooses to ignore a leading California case on "literary property"--a case in which the documents at issue were in fact as nearly identical to the documents in this case as one could imagine. In Carpenter Foundation v. Oakes, 103 Cal.Rptr. 368, 26 Cal.App.3d 784 (1972), the court ruled that the archives pertaining to the founder of Christian Science constituted literary property. The Court described those archives as follows:

> The nature of the materials is varied. There is voluminous correspondence from and speeches by Mrs. Eddy, memoirs and recollections of students who knew Mrs. Eddy, essays on Christian Science, press clippings, photographs, diaries, notes, observations, pictures, poems, precepts, quarterlies, sermons, prayers and miscellaneous documents. They include both religious discussion and witness as well as personal reminiscence. Together they constitute a composite of writings and expressions, covering many years and are of unique significance in the historical development of Christian Science.
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> [S]ome few of the papers had previously been published but by far the majority were previously unpublished. Although the record is not entirely clear, it appears that some small quantity had been copyrighted but the greater portion had not been copyrighted.... Some small portion of the documents was the original handiwork of the Carpenters, but by far the large part was non-Carpenter in origin. To what extent may plaintiff assert an ownership interest, protected by injunctive relief, in this amalgam of material, concededly assembled by plaintiff, but representing, as it does, the intellectual efforts of many others?
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> * * *
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> The Carpenter papers constituted a composite of written and printed material by and about Mary Baker Eddy and her students and followers, and as such comprised the literary and intellectual property initially of Mary Baker Eddy, her students and followers.

Id. at 370-71, 374, 375.

The court ruled that this "literary property" entails "the exclusive right of the owner to possess[ion], use and dispos[ition]," and that the

plaintiff Foundation that was custodian of that property was entitled to injunctive relief to enforce that right. Id. (emphasis added). Thus, the nearly identical materials at issue in this case constitute "literary property," which, as defendant concedes (R.Br. 70), is a category of intangible property fully subject to conversion.

Finally, defendant argues that in "every case" of documents or information constituting "literary property," a conversion cause of action is preempted by copyright law. (R.Br. 72). To the contrary, the two federal Circuit Courts that have addressed the question -- one of which overruled on this point the district court decision cited by defendants -- have found that conversion claims are not preempted by copyright law. In Oddo v. Ries, 743 F.2d 630, 635 (9th Cir. 1984), the plaintiff "alleged conversion of the papers comprising his manuscript." The court applied the generally accepted analysis to determine whether that claim was preempted by § 301(a) of the Federal Copyright Act. 17 U.S.C. § 301(a). Under that provision, a state law claim is not preempted if it rests on elements other than the rights of "reproduction, performance, distribution, or display," which are protected by the Copyright Act. See 1 Nimmer on Copyright § 101[B][1]; Oddo, supra, 743 F.2d at 635; Harper & Row Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983). In Oddo, supra, 743 F.2d at 635, the Ninth Circuit concluded that "conversion of literary property involves actions different from those proscribed by the copyright laws, and thus is not preempted."

The single case cited in Oddo on this point is the Second Circuit's decision in Harper & Row, supra, which holds that a conversion claim that rests on unlawful possession of a manuscript, as opposed to a claim solely for unauthorized publication, is not preempted by federal copyright law.41/ On this point, the Second Circuit overruled the trial court, which had interpreted plaintiff's conversion claim as one for unauthorized reproduction and publication rather than unauthorized possession. Harper & Row Publishers v. Nation, 501 F.Supp. 848, 852 (S.D.N.Y. 1980). In the instant case, plaintiffs have consistently urged their claim for possession of the archival

41/ The Second Circuit found that there was nevertheless no conversion in Harper & Row, because, as in Pearson v. Dodd, supra, the defendant had merely photocopied plaintiff's papers rather than, as here, taking possession of them.

material that was taken by defendant. Plaintiffs' claim is therefore not preempted by copyright law.42/

Indeed, the California cases cited by defendant--which were not preemption cases, even though defendant so characterizes them (R.Br. 74)--directly support this conclusion because they make clear that a claim for conversion has different elements than a typical claim for copyright infringement. See Italiana v. Metro-Goldwyn Mayer Corp. 45 Cal.App.2d 464, 114 P.2d 370, 372 (1941) (conversion is claim for possession of property, as opposed to infringement of incorporeal right); Pickford Corp. v De-Luxe Laboratories, 169 F.Supp. 118 (S.D.Cal. 1958) (action for conversion involves a taking and is therefore different from copyright action for unauthorized exhibition of motion picture).

V

DEFENDANT DOES NOT REBUT PLAINTIFFS' ARGUMENT THAT PLAINTIFFS SUFFER CONTINUING INJURY AND THAT, AS A MATTER OF LAW, ANY JUSTIFICATION DEFENSE HAS LAPSED

Plaintiffs' opening brief argued that defendant's justification defense would not block injunctive relief even if it blocked a damage remedy. Defendant's attempt to rebut this argument is unsuccessful.

First, defendant argues that the trial court ruled that plaintiffs have unclean hands. (R.Br. 75). This is true, but irrelevant to the question of whether the justification defense would independently defeat injunctive relief by extinguishing defendant's underlying liability. Plaintiffs' opening brief, of course, argued that neither the justification defense nor the unclean hands defense was properly applied to independently block injunctive relief. (A.Br., Points I and II).

42/ It is important to note that this same analysis applies--and generates the same result--even if plaintiffs' claim for repossession is characterized as one for common law copyright rather than conversion. As noted above, the Carpenter Foundation case holds that under California Law, the owner of literary property is entitled to an injunction to enforce his right to possess that property. Thus, even if such a claim is deemed a state copyright claim, it has an element (the right to possession) that is different than the elements of a federal copyright claim and is therefore not preempted.

Plaintiffs' opening brief argued that the justification defense would not defeat injunctive relief because (1) the injury to plaintiffs is a continuing one and (2) the grounds for that defense, as a matter of law, have lapsed. As to the first prong of this argument, our brief cited eight cases, plus law review commentary, stating the general consensus that continuing injury to personal rights--including privacy rights, fiduciary rights, and confidentiality rights--is a type of injury that the courts will redress through injunctive relief. Defendant attempts to distinguish only three of those cases, on the grounds that the defendants therein were seeking personal economic gain. (R.Br. 78). The goal sought by the defendants in those cases is, of course, wholly irrelevant to the proposition for which plaintiffs cited them--namely, that the injury to the plaintiffs is the kind of continuing injury on which injunctive relief is predicated. The motive of the defendants cannot alter the nature of the injury to plaintiffs. In any event, defendant does not even attempt to distinguish the authorities cited by plaintiffs that find a continuing injury to a plaintiff even where defendant's motive was non-economic, including the motive of enforcing public criminal and civil law. E.g., Bivens v. Six Unknown Agents, 409 F.2d 718,725 (2d Cir. 1969); (motive of enforcing narcotics laws); Krzyske v. United States, 578 F.Supp. 1366, 1368 (E.D.Minn 1984) (motive of enforcing internal revenue law).43/

By raising the question of motive, defendant seems to be merely reiterating the argument that his actions were justified by his belief that he was serving his interests in future litigation and future safety, and that this motive is legally distinguishable from the motive of economic gain. But mere repetition of this argument does not address the second prong of plaintiffs' argument--namely, that even if defendant's motive defense were legally valid and were factually applicable at the time he took the documents, that defense has long since lapsed as a matter of law. That is, whatever necessity there was for defendant to resort to self-help prior to

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43/ It is true, as defendant notes, that Krzyske is not an injunction case. This, however, does not detract from its explicit statement of the proposition urged by plaintiffs--namely that continued possession of documents and information by parties other than the rightful owner "creates an ongoing injury." Id. at 1368.

the resort to legal remedies has long since passed. Defendant's brief argues that plaintiffs have not identified the "undisputed facts" that support this argument (R.Br. 78). It is, of course, an undisputed fact that defendant has now had time to resort to judicial procedure to protect whatever interests were purportedly served by his unilateral taking and misuse of the documents in 1982, because defendant has already done so in his cross-complaint filed in this very case. Clearly, any interests of defendant in obtaining the documents for litigation purposes or in using the documents as a shield against Church harassment are now fully served by the current judicial oversight of this dispute.

Defendant argues that the evidentiary utility of the documents is not yet exhausted because defendant's cross-complaint must still be tried. (R.Br. 79). This misses the point, for two reasons. First, the trial court's decision includes an advance ruling that after trial of the cross-complaint, the court will not return to plaintiffs any document received in evidence or marked for identification (A.App. 252, 262). It is important to note that the question of returning the exhibits--which are the physical property of plaintiffs--is different than the question of whether the court should retain copies of those exhibits--whether under seal or not--as a record of the proceedings. (See Point VI below and A.Br. Point IV). In this regard, it is very significant that the trial court's advance ruling also provides that documents not used in the cross-complaint proceedings shall be returned to plaintiffs. This ruling can only rest on the conclusion that plaintiffs are the rightful owners of the documents and that defendant is not entitled to possess them. In this light, the court's ruling that the plaintiffs do not have a right to return of those documents that are used at trial amounts to a judicial expropriation of private property. Alternatively, it amounts to an erroneous judicial retention of physical exhibits rather than copies of such exhibits--whether under seal or not--for purposes of maintaining records of proceedings.

Indeed, the very case relied on by defendant in support of the supposed propriety of such judicial confiscation of property explicitly rejects the argument that properties constituting either "evidence" or "instrumentalities of crime are subject to forfeiture" even where the

property belongs to a convicted criminal. United States v. Farrell, 606 F.2d 1341, 1344, 1350 (D.C. Cir. 1979). If the court may not forfeit property that is either an instrumentality or evidence of crimes committed by convicted criminals, then a fortiori it may not forfeit mere evidence used in civil proceedings.44/

There is a second reason why the "evidentiary utility" of the documents is not a reason for depriving plaintiffs of their property. The trial court found that the archival documents taken by defendant include "voluminous materials, some of which appear only marginally relevant to his defense." (A.App. 261). Indeed, of the approximately 10,000 documents pilfered by defendant, he introduced only 124 into evidence in this case. Plaintiffs know of no precedent for judicial custody over a vast body of archival property--which, as the court itself acknowledges, belongs to plaintiffs--on the ground that some tiny fraction of the material may prove to have "evidentiary value" to another party in civil litigation.

VI

THE DIRTY DEEDS ASSERTED BY DEFENDANT CANNOT, AS A MATTER OF LAW, SUPPORT THE UNCLEAN HANDS DEFENSE BECAUSE THEY DO NOT TAINT THE RIGHTS ON WHICH PLAINTIFFS SUE, DID NOT INJURE DEFENDANT, DO NOT CONSTITUTE A FRAUD UPON THE COURT, AND ARE NOT NOT ATTRIBUTABLE TO PLAINTIFF MARY SUE HUBBARD

Defendant argues that the trial court's unclean hands ruling must be affirmed so long as there is substantial evidence to support it and no abuse of the trial court's discretion. In this case, however, the trial court exceeded clear rules of law governing application of that defense.45/ "The defense of unclean hands is reluctantly applied by the courts," Farmers'

44/ It is true that the Farrell court ultimately refused to order the Government to return "money paid to a government agent in an attempt to contract for the purchase of contraband drugs." Id. at 1350. But, as defendant himself notes, that ruling rested on the precise and "narrow rule" that "property delivered under an illegal contract cannot be recovered back by any party in pari delicto." Id. at 1348, 1350 (quotation omitted). Defendant here has never asserted, and the trial court made no finding, that the archival property which plaintiffs seek to recover was delivered to defendant or to the court below under an illegal contract.

45/ Plaintiffs shall also show infra that there is no substantial evidence for some of the "facts" asserted by defendant.

Educational and Cooperative Union v. Iowa Division, 141 F.Supp. 820, 824 (S.D. Iowa 1956), and, in Justice Holmes' words, "should be scrutinized with a critical eye." Coca-Cola Co v. Koke Co., 254 U.S. 143, 145 (1920).

A. The Trial Court's Ruling Is Procedurally Erroneous

Defendant argues that he was not procedurally barred from raising the unclean hands defense on the grounds that the defense had been stricken in pre-trial proceedings with leave to amend, that the trial court has discretion to amend pleadings, and that the trial court may sua sponte raise the unclean hands doctrine. None of the cases cited by defendant, however address the particular situation presented here and in Stewart v. Superior Court, 209 Cal.Rptr. 870 (1985) -- that is, a situation in which a defense is rejected by the court; the defendant loses his right to re-raise it in law and motion proceedings; yet the trial court resurrects it on the eve of the trial. In this case, the court rejected the unclean hands defense three times in pretrial proceedings. On the first two occasions, the court so ordered without any ruling that defendant had leave to amend. (A.App. 127, A.R.App. 1); on the third occasion, the court specifically granted only thirty days leave to amend from February 1, 1983 (A.App.151). Defendant, however, did not move for leave to amend until April 2, 1984 (R.App.4), well after the thirty-day deadline, well after the 10 day period for reasserting a motion under CCP § 1008, and well after the six-month period for applying for relief from a previous order under CCP § 473. Thus, when the trial court permitted defendant to re-raise the defense on the eve of trial, defendant had long since lost the right with finality and with prejudice to reasserting it. Thus, the posture of this case is identical to that of Stewart, in which a party attempted, on the eve of trial, to re-raise a special defense already lost on a law and motion order.

B. As A Matter of Law, the Unclean Hands Defense Is Inapplicable To Plaintiff Mary Sue Hubbard, Because None Of The Dirty Deeds Asserted By Defendant Have Anything To Do With Her.

It is a well-established and absolute rule of the law of unclean hands that the defense is applicable only against a party who did the dirty deed or whose agent did the deed with the knowledge and authorization of the

party. 2 Pomeroy's Equity Jurisprudence (1941) § 399, at 99; Art Metal Works, Inc. v. Abraham & Strauss, 70 F.2d 641, 646 (2d Cir.) (dissenting opinion), cert. denied 293 U.S. 596 (1934), adopted as opinion of the court, 107 F.2d 944 (2d Cir.) (per curiam), cert. denied 308 U.S. 621 (1939); Universal Builders, Inc. v. Moon Motor Lodge, 244 A.2d 10, 13-14 (Pa. 1968); Todd Protectograph Co. v. Hedman Manufacturing. Co., 254 F. 829, 837 (N.D. Ill. 1919); Associated Press v. International News Agency, 240 F. 983, 989 (S.D.N.Y. 1917) (A.Hand), modified on other grounds, 245 F. 244 (2d Cir.), aff'd 248 U.S. 215 (1918). None of the alleged dirty deeds raised by defendant were even allegedly done by either plaintiff Mary Sue Hubbard or anyone who was her agent (acting with her knowledge or otherwise). Defendant makes no attempt to so argue, and he cannot, for it is undisputed that Mrs. Hubbard was completely disassociated from Church affairs beginning in May, 1981, well before the occurrence of any of the dirty deeds asserted by defendant. (R.T. 823, 858).

Thus, as a matter of law, the unclean hands defense is inapplicable to plaintiff Hubbard and she is entitled to injunctive relief.

C. As A Matter Of Law, The Dirty Deeds Asserted By Defendant Are Insufficient To Underpin The Defense Of Unclean Hands

Defendant--in attempting to defend the trial court's unclean hands ruling--identifies five categories of purported "dirty deeds." All are insufficient under well-established law.

Aside from the specific and dispositive insufficiencies discussed below, all of the facts asserted by defendant fail to support the defense of unclean hands, because all are collateral wrongdoings. That is, none of those facts in any way taint the underlying privacy, property, or fiduciary rights on which plaintiffs brought suit. These rights and transactions are wholly distinct from the rights and transactions of which defendant complains. That is, plaintiffs' various rights in the archival material are entirely distinct from defendant's rights against purported harassment, and plaintiffs' rights were neither "acquired or retained" or in any other way tainted by the alleged infringements of defendant's rights. International News Service v. Associated Press, 248 US. 215, (1918). Defendant may seek

redress for his own personal and property rights through appropriate civil actions; and the court's grant of injunctive relief in this case would in no way preclude such redress or constitute endorsement of the alleged misdeeds. See Fibreboard Paper Prods. Corp. v. East Bay Union, 227 Cal.App.2d 675, 729, 39 Cal. Rptr. 64, 98 (1964) (where defendant committed tort against plaintiff, defendant cannot use unclean hands defense to vindicate other torts that plaintiff committed against defendant); see also Patient Care Services, S.C. v. Segal, 337 N.E.2d 471, 481-82 (Ill.App. 1975); Coca-Cola Co. v. Howard Johnson Co., 386 F.Supp. 330, 336 (N.D. Ga. (1974).

1. The Private Investigators. As noted in our opening brief, there is no evidence in the record--or finding of fact by the trial court--that the plaintiffs authorized or knew of any alleged harassment of defendant by private investigators. To the contrary, the unrebutted evidence was that Church counsel, who hired the private investigators, instructed the head of the private investigating firm only lawfully to observe Mr. Armstrong in order to see if he had the documents and to have no physical contact with him. (R.T. 3989). Defendant also concedes that the head of the investigating firm himself had no knowledge of the alleged harassment. (R.Br. 85; R.T. 3997). For purposes of the unclean hands defense, the dirty deeds of an agent are only attributable to the principal if performed with his actual authorization and knowledge, as discussed above. The conduct of the investigators is therefore not attributable to the Church. (Plaintiff Mary Sue Hubbard, of course, had no connection whatsoever with the investigators.)

2. Church Excommunications. In assessing the significance of the two Church excommunication documents, it is important to strip defendant's argument of its inflammatory rhetoric and its conclusions based on evidence admitted not for its truth but only for defendant's state of mind.46/

46/ It should be noted that defendant attempts to set his justifications defense particularly in the charges made against him in the second excommunication document. As noted in our opening brief, however, defendant learned of the second document only after his meeting with Mr. Flynn and others to arrange the wrongful use of the archived material. (A.Br. 18 n.18) While defendant's brief argues about the exact date on which defendant first learned of the second excommunication (R.Br. 23 n.30), he does not argue that he learned of it before he began obtaining the documents from Mr. Garrison for wrongful purposes. The record is very clear on this point: defendant
(footnote continued)

Defendant's misuse of Church documents constititued a serious violation of Church policy. As is the practice of many Churches, plaintiff Church issued an excommunication order depriving defendant of his privileges within the Church, including his right to resort to the internal church justice system. See Statement of Facts, supra. Any judicial finding that these excommunication documents in and of themselves constituted misconduct for purposes of unclean hands is proscribed by First Amendment religious freedoms. That is, as discussed in our opening brief (A.Br. 53-56), the judiciary is barred from inquiry into, and determination of, the meaning of religious doctrines or declarations. Thus, the only judicially cognizable significance of these excommunications is whether they were in fact followed by actual acts of harassment of defendant. Stripped of defendant's improper arrogation of the right to interpret plaintiff Church's religious pronouncements--and stripped of the attendant inflammatory rhetoric of "attack" and "fair game"--defendant's unclean hands argument rests on a series of unexceptional acts of a kind that are typical in emotional litigation: a verbal argument over ownership of some photographs that had been turned over to the Church; defendant's former wife telling him to hire a lawyer; plaintiffs' contact with witnesses; and the use of private investigators to locate stolen documents.47/ As shown below, none of these occurrences establish unclean hands; nor are these innocuous acts inflated into unclean hands by defendant's repeated improper allegations that they are typical of plaintiffs' "fair game" tactics.48/

(footnote continued from previous page)
began obtaining documents for wrongful use as early as late April or early May of 1982, (R.T. 762-63), well before late May, when he now claims to have first learned of the second excommunication.

47/ As discussed above, any harassive conduct, beyond mere surveillance, by the investigators is not attributable to plaintiff Church--and certainly not to plaintiff Hubbard--for purposes of the unclean hands doctrine.

48/ In any event, even if evidence of alleged past Church abusive practices had been properly admitted, the mere issuance of excommunication documents--even if they contained unfounded charges against defendant--cannot constitute dirty deeds in the absence of actual injurious acts against defendant. (See A.Br. 77-78). Actual injury to defendant is an essential predicate to a finding of unclean hands. See Bradley Co. v. Bradley, 165 Cal. 237, 131
(footnote continued)

Even assuming arguendo—without in anyway conceding—that the court may constitutionally interpret plaintiffs' religious doctrine and may find that it is somehow in and of itself wrongful wholly apart from actual wrongful acts, this would be a classic example of a collateral wrong that has nothing to do with the rights on which plaintiff sued. The resolution of the question whether the Church's excommunication of defendant was somehow tainted has no bearing on whether defendant infringed on rights of privacy and property in the Church archives. As in Fibreboard Paper Prods., supra, defendant here has committed torts against plaintiffs, and he may not use the unclean hands defense to vindicate the alleged torts that plaintiffs purportedly committed against him.49/

3. The Photograph Incident. As discussed in plaintiff's opening brief, the dispute between the Church and defendant over who rightfully possessed some photographs cannot, as a matter of law, constitute unclean hands. (A.Br. 17-18, 77). Defendant's characterization of the incident as a "confiscation" of his property is wildly inaccurate and sustained neither by the evidence nor the trial court's findings of fact. It is undisputed that the Church never took possession of defendant's photographs; those photographs were returned to defendant by the independent dealer to whom he had given them. (R.T. 1711). The Church received and kept only the photographs that other former Scientologists had taken from the Church and

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(footnote continued from previous page)
P.750, 752 (1913) (must be "injury" to defendant); see also cases cited at A.Br. 70.

For similar reasons, plaintiff's mere request that defendant undergo a "security check" cannot constitute unclean hands. No security check ever occurred; nor was any attempt made to force defendant involuntarily to participate in a security check. See Statement of Facts, supra. Defendant was therefore not injured in any way; and plaintiff's mere request is not wilful misconduct of any sort.

49/ In any event, defendant's argument seems to be that the excommunication documents triggered an ostensible Church practice of harassing former adherents. Such an argument is wholly outside the bounds of the record, because no evidence of actual past Church practices was admitted. See Point VIII, infra.

that the dealer had returned to the Church. (R.T. 2926, 4253-55).[50] Because the defendant was therefore in no way injured or damaged by the incident, he cannot invoke it as a grounds for the unclean hands defense. See Bradley Co. v. Bradley, supra (must be "injury" to defendant); see also cases cited at A.Br. 70.[51]

In any event, the photograph dispute, like the excommunication documents, is a classic example of a collateral transaction that has nothing to do with the rights on which plaintiffs sued. The resolution of the question of who rightfully owned the photographs has no bearing on the question of whether plaintiffs' privacy and property rights in the archives were infringed. A judicial ruling that plaintiffs' rights were so infringed would entail no "approval" of the Church's conduct in the photograph dispute--a wholly separate transaction involving wholly different rights--and would not compromise the court's "integrity" in any way. Coca-Cola Co. v. Howard Johnson Co., 386 F.Supp. 330, 336 (N.D. Ga. 1974). Any alleged wrong committed by the Church in the photographs dispute "may be redressed by a proper suit filed by" the former Scientologists who purportedly[52] claim the right to possess the photographs. Patient Care Services, S.C., v. Segal, 337 N.E. 2d 471, 481-82 (Ill. App. 1975).

4. Contacts With Family, Friends, And Witnesses.

Defendant also asserts that the Church's "contacts" with family, friends, and one defense witness support the unclean hands defense. The evidence of record shows absolutely nothing unclean about the Church's conduct in this regard. As to Church contacts with family and friends, the only evidence is defendant's bare testimony that "[f]riends of mine had been contacted" and "also that my parents had been contacted." (R.T. 2318).

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[50] Whether or not the Church kept or discarded these photographs--which the Church held under a bona fide claim of rightful possession--is irrelevant to the unclean hands issue.

[51] Even after defendant arrived at Church premises and made vehement--indeed, hysterical--demands for return of the other photographs, Church personnel made no "threats" of any kind; his former wife simply told him he should get a lawyer if he wanted to challenge the Church's possession of the documents. (R.T. 1713-14, 4258).

[52] There is no evidence that any such persons ever came forward, let alone filed a suit, to seek recovery of the photographs.

Patently, such mere "contact" cannot constitute "willful misconduct" underpinning an unclean hands defense. Cf. Restatement (Second) of Torts §652B, comment d (analagous conduct is not tortious) (quoted supra).

As to the defense witness, Howard Schomer, there is no evidence whatsoever to sustain defendant's wild charge of "witness tampering." Mr. Schomer's testimony was simply that "two of [his] closest friends" visited him in order "to get back into communication with [him]" to discuss the possibility of his rejoining the Church ("moving back onto the bridge"). (R.T. 4542). This discussion occurred before Mr. Schomer had communicated with defendant's counsel about appearing as a witness in this case. (R.T. 4546). Indeed, for several months before this discussion, Mr. Schomer and his friends had occasionally contacted each other to discuss his break with the Church--a break which had nothing to do with defendant's dispute with the Church. (R.T. 4545). There is not a shread of evidence that Mr. Schomer's two friends attempted to "tamper" with his testimony in any way.

In any event, even assuming arguendo that Mr. Schomer's two close friends had discussed with him the question of testifying against the Church, this would only amount to unclean hands if an actual fraud had been perpetrated against the court. Matthies v. Seymour Mfg. Co., 23 F.R.D. 64, 94 (D.Conn. 1958) (summarizing cases). In this case, Mr. Schomer was only asked to be a witness after his meeting with his friends, and he in fact did testify without any interference whatsoever by the Church. No fraud was perpetrated, or even attempted, against the court.

VII

THE GROUNDS RAISED BY DEFENDANT FOR UNSEALING THE DOCUMENTS ARE INAPPLICABLE AS A MATTER OF LAW, AND, IN ANY EVENT, THE TRIAL COURT MADE NO PARTICULARIZED FINDINGS TO SUPPORT THOSE GROUNDS

Plaintiffs' opening brief argued (1) that the documents at issue should remain sealed because it would be perverse--and, indeed, would be an unlawful denial of a remedy for a wrong--if the court were to infringe on the very privacy and property rights that plaintiffs brought suit to protect, and (2) that substantial California and federal case law mandates such sealing. Defendant's brief does not address the untoward policy implications of such court-ordered public exposure of private documents. Defendant attempts only

to distingush one of the cases cited by plaintiffs, United States v. Hubbard, 650 F.2d 293 (D.C. Cir. 1980), which held that the Church's generalized privacy and property interest warranted the sealing of a massive body of Church documents that had been introduced as exhibits in a hearing to protect those interests. Defendant first asserts that "the single most important element," id. at 321, in the decision in that case was that the documents were introduced as exhibits solely to show the overbreadth of a search warrant. (R.Br. 92). The actual context of that quote shows, however, that the central concern of the court was to avoid the very policy perversion that defendant here refuses to address:

> The single most important element in our conclusion that the proper balance has not been struck in this case is the fact that the documents at issue were introduced by the defendants for the sole purpose of demonstrating the unlawfulness of the search and seizure. Whatever the purposes served by the exclusionary rule, the fundamental thrust of the fourth amendment is at bottom the protection of privacy and property interests. Putting aside for the moment the prospect of untoward invasions of third-party interests, it would be ironic indeed if one who contests the lawfulness of a search and seizure were always required to acquiesce in a substantial invasion of those interests simply to vindicate them. (emphasis added).

It is true that the court subsequently noted that the documents were introduced on an overbreadth challenge to the privacy intrusion. It is indisputable, however, that the very same policy perversion is implicated in this case--and, indeed, is implicated with even greater force. In Hubbard, the proponent of the document's privacy had to introduce the documents as exhibits in order to show the overbreadth of the intrusion. Here the proponents established their case without introducing the documents. And, even if the justification defense had any legal validity, the trial court itself recognized that defendant could have adduced evidence of his state of mind defense without introducing the documents as exhibits. (See A.Br. n.55; R.T. 4602-3). Judicial exacerbation of the intrusion on plaintiffs' privacy and property would thus be even more "ironic" and gratuitous here than in Hubbard, because in this case the documents were not even necessary to litigation of plaintiffs' claims. Equally important, in Hubbard, the intrusion against the private documents was judicially authorized by a prior,

lawful search warrant based on objective probable cause; here, the documents were unilaterally "seized" by a private litigant based on subjective belief without prior judicial review. There, the challenge was only to the breadth of the intrusion; here, the challenge is to the lawfulness of the intrusion en toto. Because the challenged intrusion on privacy is therefore more egregious in this case, any judicially ordered exacerbation of that intrusion is all the more "ironic," id., and "absurd." E.I. DuPont de Nemours Powder Co. v. Masland, 222 F. 340, 341 (E.D.Pa. 1915), rev'd, 214 F. 689 (3d Cir. 1915), rev'd, 244 U.S. 100, 103 (1917). In this light, plaintiffs' "generalized interest" against public access to the private archives can hardly be seriously questioned.

Defendant argues that there are "particularized interests" that warrant public access to the documents. First, defendant asserts that "certain documents" had already been made public. (R.Br. 93).53/ Defendant cites nothing in the record or in the trial court's findings to support this bald claim. Between the time the documents were placed under seal and the time of the unsealing order, there was no public disclosure of them. (A.Br. 7 n.5).

Second, defendant argues that the documents must be released in order to "ensure prosecution" of the crimes they purportedly evidence and to prevent the "jeopardization" of remedies of "unknowing victims." Hubbard, 650 F.2d at 323. Defendant's attempt to force this case into the two extremely narrow "exceptional cases" stated by the Hubbard court is a bit far-fetched. The first exception--based on the need for public access in order to ensure prosecution--was intended to apply in situations "where a governmental failure to prosecute...substantially impugns the integrity of the prosecutorial function." Id. No one has ever suggested a lack of

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53/ Defendant also argues that plaintiffs never appealed the provision of the trial court's preliminary injunction that permitted third parties to move for discovery of the sealed documents. That provision has no bearing on the unsealing issue. The question is whether the documents were ever made public prior to the trial court's unsealing order. Hubbard, 650 F.2d at 318 n.99. The mere possibility that third parties could file motions for discovery in no way constitutes actual public disclosure, particularly since the preliminary injunction specifically provided for the parties to make any objections to such motions (R.App. 3), including privacy objections. In any event, no third-party discovery was granted prior to the unsealing order.

prosecutorial zeal in the investigation of plaintiff's affairs. The second exception--"where the remedies of grievously injured and unknowing victims would be jeopardized if the documents never entered the public domain," id.--is equally remote from the facts of this case. The trial court was well aware that defendant's attorney had already spent years combing the country in order to publicly promote his campaign of legislation and litigation--similar to defendant's counterclaim--against plaintiffs. (R.T. 267). Mr. Flynn stated at trial that he already had a "stack of material 10 feet high" that was critical of the Church, that was already in the public record, and that the documents under seal merely corroborated. (R.T. 265). Surely his public use of the documents themselves is not necessary to alert any "unknowing victims" of claims they might have. Indeed, any purported "victims" of plaintiffs could readily resort to the avenue that defendant in this case could lawfully have pursued in lieu of purloining the documents--that is, court-ordered dicovery procedures and sanctions.

In any event, once again the trial court did not make any particularized findings as to these factors, as required by Hubbard. Notwithstanding defendant's repeated quotation of the phrase "massive fraud," defendant concedes that the trial court admitted evidence going only to defendant's state of mind and that, as a matter of law, there could therefore be no finding of "crimes" or "fraud" that would go unprosecuted if the documents remained sealed. (See Statement of Facts, supra, and Point VIII, infra). In any event, even if the trial court had admitted evidence and made a proper finding of fraud or crime, this in no way establishes the particularized finding required by Hubbard. The holding of Hubbard is precisely that public access to documents will not be granted merely because the documents contain evidence of crime or fraud. 650 F.2d at 323. Rather, there must be the further particularized finding of a lack of prosecutorial integrity or jeopardization of remedies of unknowing victims. The trial court made no such particularized findings.54/

54/ Moreover, the trial court's mention of fraud was in no way connected with its bald ruling on unsealing at A.App. 252 of its decision. Even if this had constituted a particularized finding, it was therefore not made "with specific reference to the particular documents or groups of documents to which each reason is applicable" as required by Hubbard, 650 F.2d at 324.

Defendant also asserts that the trial court heard extensive argument "regarding unsealing and admission of the sealed documents into evidence before making a ruling," citing R.T. 16-133, and that the trial court spent five weeks making rulings as to the relevance and materiality of the documents. (R.Br. 92-93, n.53). In fact, the court's pretrial ruling at R.T. 125-33 was a blanket ruling that the documents would not be excluded from evidence en masse; it made no mention of the sealing question and made no particularized findings about the interests served by sealing or unsealing. The court's oral rulings on the documents at the close of trial again dealt only with the question of their admissibility into evidence, not the question of sealing.55/

Finally, defendant argues that the documents should be unsealed because some of them are neither "highly personal" nor "literary property." In fact, the documents are "literary property" and are, in large part, highly personal.56/ But, in any event, the documents need fit neither of the categories in order to be subject to a sealing order. A sealing order may be predicated on the need to prevent undue embarassment to a party, Nixon v. Warner Communications, 435 U.S. 589, 597-98 (1978), and, more generally, to avoid any results that "tend to undermine individual security, personal liberty, or private property, or that injure the public or the public good." Matter of Estate of Hearst, 67 Cal.App.3d 777, 783, 136 Cal.Rptr. 821, 824

55/ The court did mention at that time--without actually ruling--that its "general reaction" would be that documents coming into evidence would be unsealed. (R.T. 4557-58). But it then proceeded to hear argument and rule document-by-document only on the question of their admissibility, not the question of their sealing. The court at that time made absolutely no particularized findings as to any of the particularized interests raised by defendant--i.e., that individual documents had already been made public; that the integrity of any prosecutors had been impugned; and that the remedies of any unknowing victims would be jeopardized by continued sealing of the documents. Nor, as discussed above, can the reference to "fraud" in the trial court's decision constitute such a particularized finding.

56/ As discussed above in Point IV, the body of documents in this case is astonishingly similar to the archives at issue in Carpenter Foundation v. Oakes, 26 Cal.App3d 784, 792-93 (1972), archives which were held to be "literary property." And a substantial portion of the documents in this case are highly personal legal, religious, and familial writings. E.g. Exs. 500 JJJJ, KKKK, MMMM, NNNN, VVVV-YYYY, AAAAA-BBBBB, FFFFF-MMMMM:, SSSSS-BBBBBB, EEEEEE-IIIIII.

(1977). Thus, in Hubbard, the court found that the Church had the necessary property and privacy interest in a body of 12,000 organizational documents which were the Church's property and/or were treated by the Church as confidential. The court described the Church's interest as follows:

> [T]he Church relied not only on the property interests which it retained in the seized documents but on the violation of its right of privacy which release of the seized documents would effect. Although adverting to the confidential nature of the information contained in certain of the seized documents, the Church asserted a privacy interest not in particular documents but in the documents as a whole, relying inter alia, on the fact that the materials seized were documents, on the circumstances under which they were seized, on the measures theretofore taken by the parties to preserve the documents' confidentiality....

Id., 650 F.2d at 303-04. There is no dispute in this case that the Church took extraordinary measures to maintain the confidentiality of the documents--and not just particular documents but "the documents as a whole." (R.T. 736-38).

Indeed, defendant's argument is foreclosed by the trial court's explicit finding that the materials were "confidential" and "private." (A.App. 254-55). Those findings are well-supported by the federal and California decisions, cited in plaintiff's opening brief, which clearly establish that documents such as those at issue in this case--personal and family financial documents, medical records, correspondence, journals, manuscripts, religious writings--are protected by both the constitutional and common law rights of privacy. (A.Br. Point I).

In addition, the trial court implicitly found that plaintiffs have a protectible property interest in the documents--an interest itself sufficient to underpin a sealing order. Hubbard, 650 F.2d at 302-03. The trial court found a prima facie case of conversion and ruled that documents not used at trial should be returned to plaintiffs; both of these rulings necessarily rest on an implicit finding that plaintiffs have a possessory right in the documents.

VIII

DEFENDANT CONCEDES THAT DEFENDANT'S EVIDENCE WAS ADMITTED FOR THE LIMITED PURPOSE OF SHOWING HIS STATE OF MIND; THE TRIAL COURT'S DECISION SHOWS THAT IT WAS IN FACT CONSIDERED FOR ITS TRUTH

Plaintiffs' opening brief argued that virtually all of defendant's voluminous evidence -- the documents, his own testimony, his witnesses' testimony -- was introduced solely to show his state of mind;[57] that the trial judge's decision shows that he mistakenly assumed that all of that evidence was properly to be considered for its truth; and that his witnesses' testimony was also irrelevant because it was unknown to defendant and therefore could have had no bearing on his state of mind.

Defendant's opposition brief agrees that virtually all of defendant's evidence was introduced solely to show his state of mind (R.Br. 96-102);[58] acknowledges that the court's decision makes "observations"--that is, findings of fact--that rest on the actual truth or falsity of that evidence (R.Br. 97); and concedes, at least implicitly, that a large part of the evidence was unknown to defendant (R.Br. 102).[59]

57/ All of the evidence as to defendant's justification defense was admitted for the limited purpose of showing his state of mind. The only evidence admitted for its truth was the evidence pertaining to events after defendant left the Church--that is, evidence introduced in an attempt to prove that the Church had unclean hands, yet the court apparently relied on vast amounts of evidence admitted for other limited purposes. See Statement of Facts, supra.

58/ Defendant agrees that all three categories of evidence were offered and admitted only to show defendant's state of mind: the documentary evidence (R.Br. 98); defendant's testimony (R.Br. 100); and the testimony of defendant's witnesses (R.Br. 102).

Defendant also does not dispute that much of this evidence was hearsay; at R.Br. 101 n. 59 and 102 n. 60, defendant argues only that this hearsay evidence was introduced to show defendant's state of mind. The trial court's consideration of this evidence for its truth is thus doubly erroneous--it was not introduced for that purpose and it was hearsay.

Defendant notes that seven of the voluminous hearsay documents were not admitted into evidence, that one was authenticated and not objected to on hearsay grounds (Ex. AAA), and that another was conceded to be relevant (500 SSSSSS). (R.Br. 100 n. 58). In fact, there was a clear objection to Ex. AAA on hearsay grounds (R.T. 3730)--indeed, plaintiffs asserted a hearsay objection against all the documents in their motion in limine (A.App. 233)--and the fact that it was authenticated does not negate the hearsay objection. Nor does the fact that Ex. 500 SSSSSS is relevant negate its hearsay nature.

59/ Defendant argues that this evidence "corroborated" defendant's state of mind because it dealt with general "practices" or "matters" similar to those as to which he had direct knowledge. Clearly, this argument rests on the

(footnote continued)

Defendant argues that there was nonetheless no miscarriage of justice because on appeal there is a presumption that the trial court has not considered improperly admitted evidence and--presumably, although defendant does not so articulate--that the trial court has not considered evidence for purposes other than the limited purposes for which it was admitted. Such an a priori presumption, however, is inoperative where, as here, the trial court's decision explicitly rests on such improper consideration of evidence.60/ In this case, the trial court's decision makes explicit findings of fact as to the truth of the evidence admitted only for state-of-mind purposes.

We respectfully submit that no fair reading of the trial court's decision can lead to any conclusion other than that the trial court considered this vast evidence for its truth and that such improper consideration, at the very least, "may have...turned the scale" on the judge's ruling on the justification and unclean hands defense. Estate of James v. Jones, 124 Cal. 653, 655 (1899). Our opening brief cited several clear examples of improper consideration of evidence in the trial court's decision. (A.Br. 96-98). Such examples are by no means exhaustive; the

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(footnote continued from previous page)
implicit concession that defendant did not have direct knowledge of the actual acts or events as to which those witnesses testified; and, in fact, the record shows that defendant had no such knowledge. See A.Br. 93-94. As discussed below, defendant's argument about "corroborative" evidence is incorrect.

60/ Defendant cites Eldridge v. Scott Lumber Co., 187 Cal.App.2d 457, 9 Cal.Rptr. 623 (1960) for the proposition that where the court makes a statement that it is not considering improper evidence, there is no prejudicial error; and defendant later refers to the trial court's rulings that defendant's evidence was admitted only to show his state of mind and not for its actual truth. In Eldridge, however, wholly inadmissible evidence had entered the record, and at the time of rendering its decision, the court stated that it had not considered that evidence. Id. 187 Cal.App.2d at 461. This is quite different from the instant case. Here, the trial court's statements were made as rulings on plaintiffs' objection to defendant's evidence offered during trial. Those rulings admitted the evidence for the sole purpose of showing defendant's state of mind. At the time the court rendered its final decision, however, the court made no statement that it was acting within the limits of the prior rulings; quite to the contrary, as detailed below, the court's decision explicitly makes findings as to the actual truth or falsity of that evidence.

trial judge's manifest, albeit mistaken, assumption that the evidence was to be considered for its truth pervades every paragraph of his decision.61/

Defendant attempts to dismiss the trial judge's improper consideration of the evidence as "observations" that "can be considered dicta." (R.Br. 97). Claiming that there are "other factual findings" that "directly support" the trial court's conclusions of law, defendant cites the Appendix to the trial court's decision and the legal discussion at A.App. 255-56 of that decision. That legal discussion, of course, is not "other factual findings." And, the fifteen-page Appendix to the trial court's decision--which is merely the defendant's pretrial statement of facts, with no reference to the actual evidence adduced at trial--contains a single conclusory statement that defendant had "knowledge of the covert and intelligence operations" of the Church. (App. 276). Thus, the only substantial findings that purport to provide the factual underpinning for the justification defense are those contained in the body of the trial court's decision at Appellants' Appendix 257-262. As detailed above, those findings are pervaded with improper findings as to the actual truth or falsity of defendant's charges against the Church, resting on evidence admitted only to show defendant's state of mind. Even if this is "dicta," it shows that there is more than a "reasonable probability" that the court improperly considered

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61/ Every paragraph of factual analysis in the trial court's decision states findings as to the truth of alleged misdeeds by the Church and explicitly rests those findings on evidence admitted only for defendant's state of mind. The trial court's analysis of the facts begins with the first full paragraph on page 257 of Appellants' Appendix. The first sentence of that paragraph endorses the testimony of defendant's key witnesses--testimony which, all parties agree, was admitted not for its truth but only for showing defendant's state of mind. In summarizing the "picture painted" by these witnesses, however, the court explicitly finds that the evidence establishes actual "abuse" and "intimidation" by the Church. (A.App. 258).

In the next paragraph, the court again refers to a flagrantly hearsay document--which again had not been admitted for its contents but only for the fact that it was among the Church archives (R.T. 4655)--but concludes that the evidence shows actual abuse, harassment, "paranoia," etc., on the part of the Church and its founder. (App. 258-259).

In the next paragraph, the court twice refers to Exhibit AAA, a hearsay document admitted only for defendant's state-of-mind, and concludes that there was an actual "practice" of culling confidential files for purposes of intimidation or harassment. (App. 262).

evidence that may have "tipped the scales" on a determinative issue in the case--it shows that there is a certainty that the court did so. Indeed, when it suits defendant's purposes, his brief elsewhere argues repeatedly that the trial court did make specific findings of the actual truth of defendant's evidence. (E.g., R.Br. 48, 51, 52, 53, 56, 87, 88, 93).

Plaintiffs' opening brief also argued that defendant's witnesses gave lengthy and inflammatory testimony about events that were unknown to defendant and therefore irrelevant to the only issue for which their testimony was admitted, that is, defendant's state of mind. (A.Br. 92-94). Defendant's response is that this was "cumulative and corroborative" of defendant's state of mind and that even if it was inadmissible, its admission was harmless error. The flaw in this argument is that the evidence in question was neither cumulative nor corroborative of any material question presented to the court. As discussed in our opening brief, under California law a "reasonable belief" defense rests on what would appear necessary to a reasonable person knowing what defendant knew; and therefore evidence of plaintiff's prior acts or threats are relevant only if a defendant establishes his knowledge of those facts at the time he acted. E.g., Boyer v. Waples, 206 Cal.App.2d 725, 727 (1962); Villines v. Tomerlin, 206 Cal.App.2d 448 (1962); People v. Chand, 116 Cal.App.2d 242 (1953); People v. McDaniels, 70 Cal.App.2d 207 (1945).62/ Thus, the inflammatory and voluminous testimony by defendant's witnesses was neither cumulative nor corroborative of defendant's reasonable belief, because it is undisputed that

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62/ Defendant's artful editing of a passage from Prosser's Law of Torts (5th Ed. 1984) is quite revealing. (R.Br. 100-101). The actual quotation is:

> Evidence as to [the actor's] state of mind and nerves, and the threats, past conduct, and reputation of his assailant which may have induced it, is important and admissable on the issue of what was reasonable.

Id. at 125 (emphasis added). That is, evidence of the assailant's past acts and threats is only relevant if they are acts and threats that induced the defendant's state of mind--that is, acts known to the defendant. Defendant's selective quotes at R.Br. 100-101 misleadingly excise the phrase "which may have induced it."

defendant was unaware of the events to which they testified.[63] By definition, irrelevant evidence cannot "corroborate" any issue material to the court's decision.

In any event, even if this testimony were relevant, defendant concedes that it--like the rest of defendant's evidence--was intended only to show defendant's state of mind. (R.Br. 102). As discussed above, the trial court improperly considered this evidence for its truth.

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[63] Defendant's brief also argues that defendant had knowledge of the general "matters" as to which his witneses testified. (R.Br. 102). This is not good enough. As noted above, defendant must establish that he had knowledge of the very facts--i.e., the actual events, acts or threats--that the other witnesses testified to. It is not enough that they testified to acts that are similar to those he knew of.

CONCLUSION

For the reasons discussed above and in appellants' opening brief, this court should reverse the trial court's judgment, order entry of judgment and injunctive relief for appellants, order permanent sealing of the private documents, and remand to a new trial judge for proceedings to determine damages.

Dated: March 25, 1986

Respectfully submitted,

Eric M. Lieberman

DONALD RANDOLPH
OVERLAND, BERKE, WESLEY,
GITS, RANDOLPH & LEVANS
2566 Overland Ave.-7th Fl.
Los Angeles, Cal. 90064
(213) 559-8150

Counsel for Appellants

JOHN G. PETERSON
PETERSON & BRYAN
8530 Wilshire Boulevard
Beverly Hills, Cal. 90211
(213) 659-9965

Counsel for Appellant
Church of Scientology
of California

ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN, STANDARD,
KRINSKY & LIEBERMAN, P.C.
740 Broadway, Fifth Floor
New York, New York 10003-9518
(212) 254-1111

Counsel for Appellants

MICHAEL LEE HERTZBERG
275 Madison Avenue
New York, New York 10016
(212) 679-1167

Counsel for Appellant
Mary Sue Hubbard

REPLY APPENDIX

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES **DEPT.** 83

DATE January 4, 1983

HONORABLE Lawrence Waddington JUDGE | D. Fields DEPUTY CLERK

HONORABLE JUDGE PRO TEM

22 Deputy Sheriff | None Reporter (Parties and counsel checked if present)

C 420 153

Church of Scientology of Ca., etc.
vs
Gerald Armstrong, et al

Counsel for Plaintiff Howard Stebel ✓

Counsel for Defendant Contos & Bunch
by Bruce Bunch

NATURE OF PROCEEDINGS.

Motion of defendant, Gerald Armstrong for leave to file an amended answer

Denied. No factual support for legal conclusion.

☐ IT IS STIPULATED that Commissioner ..... may hear this matter as Judge Pro Tem.

☐ TRANSFERRED TO/FROM DEPARTMENT ..... ☐ Court disqualifies itself ☐ 170.6 CCP affidavit filed

☐ OFF CALENDAR ☐ On court's own motion ☐ No Appearance ☐ At request of moving party ☐ By stipulation

☐ CONTINUED TO ..... IN DEPT. ..... AT ..... AM PM

☐ On court's own motion ☐ Stip. to be filed ☐ On oral/written stipulation.
☐ REQUEST OF ☐ Moving party ☐ Respondent(s)
☐ TRO to remain in full force and effect ☐ TRO dissolved

☒ NOTICE: ☐ Waived ☐ By moving party ☒ By respondent(s)

☐ PETITIONER(S) IS/ARE SWORN AND TESTIFIES/TESTIFY

☐ PETITION IS GRANTED (AS AMENDED) ☐ DECREE IS SIGNED AND FILED.

MINUTES ENTERED
Jan 4 1983
COUNTY CLERK

B-225

A.R.App. 1 22 DEPT. 83